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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AGNES FRASER, EXECUTRIX OF THE ESTATE OF HECTOR FRASER,

Petititoner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL P. KOSKOFF
Counsel of Record
KOSKOFF, KOSKOFF & BIEDER, P.C.
Attorneys for Petitioner
350 Fairfield Avenue
Bridgeport, Connecticut 06604
(203) 336-4421

MARK C. DURKIN
Of Counsel
EFFRON & DURKIN, P.C.

Dated: August 8, 1996

106 pp

QUESTIONS PRESENTED

I. Can the Court of Appeals in the context of a motion for summary judgment decide issues of credibility of expert witnesses and summarily reject the uncontroverted psychiatric expert opinion evidence offered by the non-movant without articulating any grounds or without engaging in the two-part analysis set forth by this Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ?

II. Can the Court of Appeals, in the context of a motion for summary judgment decide the ultimate issues of fact relative to the proper diagnosis and care of a psychiatric patient and foreseeability of the patient causing harm to a specific victim or class of victims in the absence of any psychiatric expert opinion evidence offered by the movant ?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff-petitioner, Agnes Fraser, Executrix of the Estate of Hector Fraser; the defendant-respondent, United States of America; an amicus curiae, The Connecticut Legal Rights Project, Inc. representing the Center for Independent Living of Southwest Connecticut, The Center for Independence and Access, Disabilities Network of Eastern Connecticut, The Independence Northwest, and The Independence Unlimited; an amicus curiae, The State of Connecticut Department of Mental Health and Addiction Services; an amicus curiae, The Mental Health Association of Connecticut, Inc.; and an amicus curiae, The Connecticut Psychiatric Society -- a district branch of the American Psychiatric Association. There are no parent or non-wholly owned subsidiaries of the corporate entities listed above.

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No.

In The

Supreme Court of the United States

October Term, 1995

Agnes Fraser, Executrix of the Estate of Hector Fraser,

Petitioner,

vs.

United States of America

Respondent,

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Agnes Fraser, Executrix of the Estate of Hector Fraser, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit affirming the judgment of the United States District Court (Warren W. Eginton, U.S.D.J.) in favor of respondent dismissing plaintiff's action is reported at 83 F.3d 591 and is reprinted as Appendix A at pages 1a-3a. The interlocutory order of the Court of Appeals certifying two questions of law to the Connecticut Supreme Court and retaining jurisdiction thereafter is reported at 30 F.3d 18 and is reprinted as Appendix B at pages 4a-12a. The unreported "Joint Statement of Relevant Factual Circumstances", so ordered by the Second Circuit for use by the Connecticut Supreme Court in deciding the certified question of law is reprinted as Appendix C at pages 13a-23a.

The unreported order of the Connecticut Supreme Court denying petitioner's motion for reargument or reconsideration is reprinted as Appendix D at pages 24a-25a. The decision of the Connecticut Supreme Court answering the reformulated certified question of law is reported at 236 Conn. 625, 674 A.2d 811 and is reprinted as Appendix E at pages 26a-48a. The unreported letter ruling of the Connecticut Supreme Court conditionally accepting certification of a reformulated question of law is reprinted as Appendix F at pages 49a-51a. The unreported "Amended Ruling on Motion for Summary Judgment" of the United States District Court (Eginton, Warren J.) granting summary judgment in favor of defendant is reprinted as Appendix G at pages 52a-63a. The unreported endorsed order of the District Court (Eginton, W.J.) affirming the grant of summary judgment in favor of defendant on petitioner's motion for reconsideration is reprinted as Appendix H at pages 64a-65a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its order affirming the judgment of the District Court dismissing petitioner's action on May 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The pertinent provision of the Federal Tort Claims Act, 28 U.S.C. §2674, upon which this action was founded is reprinted in Appendix I at pages 66a-67a.

STATEMENT OF THE CASE

This medical malpractice action was brought under the provisions of the Federal Torts Claims Act (28 U.S.C. §2674) and arises out of the brutal murder of Hector Fraser (hereinafter "decedent"). On June 17, 1985, John Doe, a psychiatric patient of the West Haven VA and employee of the decedent, was working with the decedent and his son installing carpet on a job site. (CT. R. p. 75-76, par. 1-2[1]; Jt. A. p. 23, 732-33[2]). While decedent's son had left the job site to buy coffee, Doe attacked the decedent and fatally stabbed him almost forty-times. (App. C p.14a, par. 1-2).

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[1] "CT. R. ___, par. __" refers to specific pages and/or paragraphs contained within the Record on Appeal before the Connecticut Supreme Court in connection with deciding the reformulated certified questions of law.

[2] "Jt. A. par. __" refers to specific pages and/or paragraphs of the parties' 1110-page Joint Appendix filed first with the Second Circuit as part of the appeal thereto, and then with the Connecticut Supreme Court as part of the Record on Appeal.

A] Doe's psychiatric history

At the time of the attack, Doe was under the exclusive care and treatment of the United States Veterans Administration Medical Center in West Haven, Connecticut (hereinafter, "West Haven VA") for a serious psychiatric illness that dated back to 1970 which seemed to have originated with the death of his mother. (Jt. A. pp. 50-53, 158-60, 733-39, 758-60).

In May of 1974, Doe's condition was first diagnosed as "schizo-affective schizophrenia" by the Evans Mental Hygiene Clinic in Okinawa, Japan while Doe was in the Marines. (App. C p. 14a, par. 3; Jt. A. p. 50-51, 67). On May 25, 1974, he was medically evacuated to the Naval Regional Medical Center in Philadelphia and was treated on an in-patient basis continuously through June 28, 1974. (App. C p. 14a-15a, par. 4; Jt. A. p. 78-80). He was diagnosed with "schizophrenia . . . manifested by delusions and hallucinations, thought disorder, inappropriate affect, social withdrawal and grandiosity" and was found to be suffering "from a mental illness of psychotic proportions" that rendered him unfit for military service. (App. C p. 15a, par. 5).

Between May of 1974, and February, 1979, Doe was treated by four medical facilities operated under the auspices of the United States, including the West Haven VA in September, 1974. (App. C p. 14a-15a, par. 4). He was treated on an in-patient basis on four occasions (i.e., 5/25/74-6/28/74 for 34 days; 11/8/76-11/16/76 for 8 days; 12/12/76-12/30/76 for 18 days; and 12/13/77-3/24/78 for 101 days) and on an out-patient basis for the remainder of the period. Doe's diagnoses during this period of time included "paranoid state", "schizophrenia", "paranoid schizophrenia" and "chronic paranoid schizophrenia".

On March 3, 1979, Doe was again admitted to the West Haven VA for in-patient treatment for a period of 185 days and was diagnosed as having paranoid schizophrenia. (Jt. A. p. 52-53, 182, 184, 277-94). Upon his discharge, Doe remained under the continuous care and treatment on an out-patient basis of the West Haven VA through and including June 17, 1985, the date of the attack. (App. C p. 15a, par. 6). In fact, between October 3, 1980, and June 13, 1985, Doe appeared at the West Haven VA sixty-one times for treatment and consultations averaging more than one visit per month. (Id.)

Doe's documented psychiatric history since May, 1974, reveals Doe to be a seriously ill individual with a very complicated, grandiose, and paranoid delusional system involving violent and very bizarre conduct. There are repeated references in Doe's medical records where he describes himself as being involved in "secret missions . . . for the CIA and FBI involving secret rendezvous [sic], stakeouts and top secret investigations", and in repeated violent confrontations, fights, and killings involving guns and knives. (App. C p.15a-16a, par. 7).

Doe had an obsession and fascination with weapons for years, which the West Haven VA knew about. (App. C p. 16a, par. 10). Doe began keeping loaded guns next to his bed and carried them in public places since the early 1970's. (App. C p. 16a, par. 9). As far back as 1981, Doe habitually wore an eight-inch buck knife. (App. C p. 17a, par. 12)[3]. Doe had been arrested a number of times for carrying concealed weapons and for stealing $157.00

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[3] For additional references to Doe carrying guns and knives, see the Joint Appendix filed with the Second Circuit at pages 58, 68-71, 81-83, 90-98, 101-02, 105, 126-28, 136-39, 148-50, 158-60, 180-, 182, 198, 200-03, 208, 212, 214-18, 308.10, 313, 317, 319, 321-24, 336-41, 359-50, 756-61, 773-75, 791, 800, 803, 884, 964-76, 993-94, 1030-31, 1035, 1048-49, 1055-58, 1082-83.

from a prior employer, as a result of what Doe believed to be "a command from his bosses in the British Intelligence". (App. C p. 16a, par. 9; Jt. A. p. 126, 158, 182, 308-09, 313, 319, 735-38, 791, 803, 843, 845).

Doe was often described to be dressing in very unusual, loud and flashy "superfly" clothes and, most often, in army fatigues and long trench coats. (App. C p. 16a, par. 8; Jt. A. p. 126, 605, 612-616, 1070). Similarly, he was often seen engaging in highly unusual conduct such as laughing out loud for no apparent reason while eating raw meat and holding a gun. (Id.). On at least two occasions, Doe was reported as having suicidal ideations, and in one of those instances, he was quoted as saying, "thought about blowing brains out [with] gun." (Jt. A. p. 162, 843).

In June, 1990, after the murder, the Connecticut Valley Hospital summarized Doe's psychiatric history as follows:

> . . . patient appears to have been suffering continuously from fixed delusions regarding conspiracies about Secret Service Organizations of many countries, of a grandiose and paranoid nature since 1974. Patient believes that he is employed by the U.S. government to seek out and destroy spies. 'I am a trained assassin and have killed 1500-2000 KGB agents." Paranoid and violent delusions since 1974 with stabbing of employer 37 times in 1985. Patient has a history of carrying knives and loaded guns since adolescence. This 36 year old . . . male has had serious psychiatric illness for many years which was not recognized until he committed a murder. [emphasis added].

(Jt. A. p. 845-48).

B] Doe's emotional state was in "massive decompensation" in the months preceding the murder

According to the uncontroverted expert psychiatric testimony before this Court, in the months and particularly the three weeks preceding the murder, Doe's psychiatric condition was in a state of "massive decompensation and psychosis". (App. C p. 17a-18a, par. 15; Jt. A. p. 962). Dr. Robert P. Granacher, one of plaintiff's psychiatric experts, testified that "this man was psychotic in April and May, as early as April, 1985, and if someone had spoken with the family, it would have been quite clear that this man was in the process of decompensating and was seriously mentally ill." (App. C p. 17a-18a, par. 15-16; Jt. A. p. 962-63). In fact, based upon Doe's medical records alone, Dr. Granacher testified:

> I have here in front of me about a one and a quarter inch stack of records, and I'm assuming that this is the entire VA medical record on this man . . . there is sufficient information contained in that record that <u>if I had never seen this man before in my life, I could pick that record up and in about 10 minutes tell you I had a very crazy, very potentially dangerous person</u>.

(Jt. A. p. 810, 964) (emphasis added).

Dr. James Alexander, the staff psychiatrist for the Bridgeport Correctional Center who treated Doe from June 27, 1985, through January 9, 1986, while Doe was incarcerated following the murder (App. C p. 17a, par. 13-14) and who was later retained by plaintiff as a psychiatric expert, stated that in the weeks preceding the murder:

> if someone had asked the questions, it would have been very apparent that he was committable and should have been committed. I think he was very, very, very psychotic at the time and had somebody asked him about his disease, I don't think there is any psychiatrist that would not have committed him. [emphasis added].

(App. C p. 17a-18a, par. 15; Jt. A. p. 1068, 1059).

Dr. Francis Hamilton, the psychiatrist for the Norwalk Hospital who evaluated and treated Doe for the five-day period immediately following the murder (i.e., 6/17/85-6/22/85) (App. C p. 17a, par. 14) concurred. He noted that Doe had been struggling with changes in his life for several months prior to the murder. (Jt. A. p. 1094, 1102-1103). In the weeks just prior to the murder, he noted significant signs of decompensation in Doe's condition [i.e, Doe stopped taking his medication, had trouble sleeping, and became more convinced Hector Fraser (i.e., the decedent) was part of a British plot] and that Doe had complained of increased feelings of paranoia. (App. C p. 17a-18a, par. 15; Jt. A. p. 1091-1103).

Not only did the defendant fail to recognize, properly diagnose and treat such serious signs of decompensation, (Jt. A. p. 848, 958, 1049-50), defendant seriously worsened Doe's deteriorating condition by making almost a ten-fold reduction in his anti-psychotic medication within two weeks of the murder. (App. C p. 19a, par. 17d.; Jt. A. p. 986-89, 1063-65). Dr. Granacher testified that defendant changed Doe from a powerful anti-psychotic dosage (i.e., equivalent of 1500-2500 milligrams of Thorazine per day) to a non-therapeutic and non-antipsychotic dosage (i.e., equivalent of 240 milligrams per day). (Jt. A. p. 986-90, see also 1064-65). He explained: "You don't take a man who's been on high doses of Haldol

for years and suddenly give him a glass of water, which is basically what they did." [emphasis added]. (Jt. A. p. 988). Dr. Alexander testified that such a drastic reduction in medication was very risky and should not have been done on an out-patient basis, but rather while Doe was hospitalized. (App. C p. 19a, par. 17d; Jt. A. p. 1066). Both experts concurred that the defendant's reduction of Doe's medication was directly related to and, in fact, further triggered Doe's decompensation and psychosis at the time of the murder. (Jt. A. p. 962, 990-92, 1050-51, 1063-64).

Doe's violent delusions and heightened paranoia in the weeks prior to the murder all centered around Hector Fraser. Dr. Alexander testified that Doe was having violent delusions involving Hector Fraser prior to the murder and that Hector Fraser was the likely target and an identifiable victim of Doe's violence. (R. p. 80 par. 16; Jt. A. p. 1086-88). More significantly, Dr. Hamilton observed that in the weeks before the murder, Doe became increasingly angry and frustrated at Hector Fraser because he had criticized Doe on the job and because Mr. Fraser's family was living and working in this country and doing well without becoming citizens, while Doe was struggling with his life. (Jt. A. p. 1091, 1102). Dr. Hamilton testified that:

> [Doe] became more convinced that Hector was part of some kind of a British plot, that he was part of what he called Queens Intelligence, that he was actively involved in undermining America, and felt that Mr. Fraser was part of that, and that [Doe] at the time that the event occurred, felt that he had been told to kill Mr. Fraser. He was hearing voices at that time telling him to kill him and voices also saying not to kill him.

(Jt. A. p. 1103, 233 also, 1091).

Doe spent a lot of time with the decedent and his family. Between 1967 and June, 1985, the decedent employed Doe, part time, to do odd jobs at the request of Doe's father who was decedent's friend and accountant. (App. C p. 16a-17a, par. 11; Jt. A. p. 597-601). On the days Doe worked for the decedent, generally, he met the decedent at the house for coffee and a ride to the job site. (Id.) On many occasions, Doe joined the Frasers for dinner and watched television with the decedent. (Jt. A. p. 608).

REASONS FOR GRANTING THE WRIT

A] The Court of Appeals has so far departed from and sanctioned the District Court's departure from the accepted and usual course of judicial proceedings relative to well-established principles of summary judgment by deciding issues of credibility and summarily rejecting uncontroverted psychiatric expert opinion evidence without articulating any grounds or without engaging in the two-part Daubert analysis.

1. The Relevant Proceedings Below

The plaintiff alleges that the defendant was negligent and committed medical malpractice by: failing to properly diagnose or recognize the deterioration of Doe's psychiatric condition; failing to properly medicate and monitor Doe; failing to warn those close to Doe; and failing to undertake such actions as were reasonably necessary to control Doe[4] so as to protect others from Doe's violent propensities. (Jt. A. p. 33-45). In an "Amended Ruling on Motion for Summary Judgment", the United States District Court

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[4] Plaintiff's duty to control claim is premised upon sections 315 and 319 of the Restatements of Torts (Second). These sections are reprinted in Appendix J hereto on page 68a.

(Eginton, W.) granted defendant's motion for summary judgment. On the duty to warn, the District Court held "no genuine issue of fact exists regarding the foreseeability that Doe would commit an act of violence upon another person just days after he reported being in an improved condition." (App. G p. 62a-63a). The District Court summarily rejected petitioner's expert opinion evidence as "not supported by the evidence" and credited a single unsubstantiated statement of a resident treating physician. (Id.) On the duty to control, the Court found no "special relationship" existed between Doe and the respondent and therefore, no duty to control. (Id. at p. 59a.)

In a written order dated July 15, 1994, the Second Circuit affirmed the grant of summary judgment on the duty to warn, (App. B p. 8a-9a; 30 F.3d at 19), finding, contrary to the affidavits of plaintiff's experts, that the evidence "did not show it was foreseeable that Doe would commit an act of violence against Hector Fraser" (Id.) . The Second Circuit rejected petitioner's expert opinion evidence and held as a matter of law:

> [I]n the absence of any objective indicia of a patient's propensity to cause harm, we are unwilling to conclude that, under Connecticut Tort law, a claim alleging a breach of a duty to warn should reach a jury solely on the basis of expert opinion testimony suggesting that more searching questioning by the defendant psychotherapist would have revealed the patient's otherwise unforeseeable potential for harm.

Id. at p. 9a.

On the duty to control, the Second Circuit certified two questions of law[5] to the Connecticut Supreme Court for decisions. (Id. at page 11a-12a). The Connecticut Supreme Court reformulated the two certified questions into one[6] and accepted the certification on the express condition that the Second Circuit certify the relevant factual circumstances upon which the question of law was to be decided. (App. F p. 50a). The Second Circuit "So Ordered" a Joint Statement of Relevant Factual Circumstances on May 11, 1995, for use by the Connecticut Supreme Court. (App. C p.13a-23a.)

Thereafter, the Connecticut Supreme Court ruled that there was no duty to control because respondent neither knew nor had reason to know that Doe would attack the decedent because the decedent was not an identifiable victim. (App. E p. 39a; 236 Conn. at 637). This ruling was based upon the District Court and Second Circuit's conclusions relative to the duty to warn (i.e., it was not foreseeable Doe would become violent) which were applied to the duty to control. However, Associate Justice Berdon wrote a highly critical dissenting opinion. Upon his review of the Joint Statement of Relevant Factual Circumstances, he concludes:

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[5] The two questions certified were : 1. Does Connecticut recognize a general duty on the part of a psychotherapist to control a patient being treated on an outpatient basis in order to prevent harm to third persons ? 2. If so, do the allegations of the complaint in the pending case, as amplified by the submissions of the plaintiff in opposition to the defendant's motion for summary judgment present a triable jury issue ?

[6] The Connecticut Supreme Court's reformulated question was: In the circumstances of the case, does a psychotherapist have a duty to control a patient being treated on an outpatient basis in order to prevent harm to third persons ?

> Surely, a reasonable psychotherapist should have recognized Doe as an individual with a propensity for violence. Additionally, Doe's belief that Fraser was involved in a British espionage plot, under the circumstances of this case, identified Fraser as a foreseeable victim. This Court should not compound the mistake of the Court of Appeals by blindly accepting that court's conclusion with respect to Doe's propensity to cause harm when such a conclusion is at odds with the stipulation of facts . . .. Accordingly, there is sufficient evidence for a jury to conclude that Doe had a propensity for violence and that Fraser was a foreseeable victim.

(Id. at p. 45a; 236 Conn. at 642-43).

Subsequently, the Connecticut Supreme Court denied petitioner's motion for reargument. (App. D p. 24a). Whereupon, the Second Circuit issued its order dated May 13, 1996, affirming the dismissal of petitioner's action (App. A p. 1a-3a).

2. The Lower Courts Violated Fundamental Principles of Law on Summary Judgment By Judging the Credibility of Plaintiff's Medical Expert Witnesses

On a motion for summary judgment, the burden rests upon the moving party to establish that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Hurwitz v. Sher, 982 F.2d 778, 788 (2d Cir. 1992), cert. den., 508 U.S. 912, 113 S.Ct. 2345, 124 L.Ed.2d 255 (1993). Not only must there be no genuine issue as to the evidentiary facts, there must also be no controversy regarding the inferences to be drawn from them. Lendino v. Trans Union Credit Co.,

970 F.2d 1110, 1112 (2d Cir. 1992); Donahue v. Windsor Board of Fire Commissioners, 834 F. 2d 54, 57 (2d Cir. 1987).

A court's function in ruling upon a motion for summary judgment is very narrow. The court is not permitted to undertake to evaluate the credibility of the witnesses, weigh the evidence, or resolve factual issues. Rather, its sole function is to determine whether there exists a genuine issue to be tried. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202, 216 (1986); Lendino v. Trans Union Credit Co., supra, 970 F.2d at 1112; International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1263 (5th Cir. 1991), cert. den., 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992). Summary judgment is appropriately granted only where the court can conclude that "'no reasonable trier of fact could find in favor of the non-moving party.' Lunds, Inc. v. Chemical Bank, 870 F.2d 840, 842 (2d Cir. 1989) . . .." Leon v. Murphy, 988 F.2d 303, 308 (2d Cir. 1993).

In this case, petitioner put forth expert medical opinion evidence of three board-certified psychiatrists. (Doctors Francis Hamilton, Robert Granacher and James Alexander). Significantly, the opinions of Doctors Hamilton and Alexander were based not only upon Doe's voluminous medical records, their professional training and experience, but also upon their personal observations of and interviews with Doe in the days and weeks immediately following the murder. (See medical opinions and record references herein, supra at p. 7-9). Collectively, these medical experts opined that: Doe's psychiatric condition was in a state of psychosis and massive decompensation in the weeks preceding the murder. (App. C p. 17a-18a, par. 15); it was predictable that Doe would become violent in and about the date of the murder (App. C p. 18a, par. 16); the decedent fit within Doe's delusional scheme and, therefore,

was a foreseeable victim (App. C p. 17a-18a, par. 15-16); and that a reasonable psychiatrist knew or should have known of these facts. (Id. at par. 15, see also supra. p. 7-9).

Yet, the District Court, the Connecticut Supreme Court and the Second Circuit summarily rejected these opinions as well as the basis upon which they were founded[7] without any analysis. The Second Circuit simply held, without any factual or opinion evidence in the record, that "in the absence of any objective indicia of a patient's propensity to cause harm" the existence of expert opinion testimony to the contrary alone, would not warrant this case going to the jury. The only way in which the Second Circuit or any of the lower courts could have reached its ultimate conclusion (i.e., it was not foreseeable Doe would become violent to those around him) which is directly contradicted by petitioner's psychiatric medical expert testimony, is to reject the expert opinions as not being credible. However the lower courts are not permitted to judge issues of credibility on a motion for summary judgment. (See citations herein, supra at p. 13-14). Consequently, the lower courts violated the most

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[7] To support their opinions, Doctors Alexander and Granacher cited the following objective facts which they found to be medically significant: Doe's long-standing grandiose, paranoid, and violent delusional scheme involving spies, espionage, killings and serious crimes (A.p. 965, 970, 1030-31, 1049-51, 1070,1082-83); his history of having a fixation with and possession of guns and knives (A. p. 965, 1082-83); Doe's prior violent acts of assaulting an officer in the marines, an alleged self-defense killing in a movie theater, an arrest for stealing from an employer, carrying loaded guns, and responding to command hallucinations (A. p. 965, 968-76, 1055-56); the significant reduction in Doe's anti-psychotic medication in the weeks just prior to the murder (A. p. 986-95, 1049, 1059-60, 1063-64, 1067); and the clear signs of decompensation or deterioration in Doe's psychiatric condition (A. p. 920-31, 962, 990-91, 1048-49, 1052, 1058), to name just a few.

fundamental principles of law on summary judgment thereby warranting the grant of the instant petition for a writ of certiorari.

3. The Lower Courts Failed to Abide by This Court's Mandates in Daubert

In determining whether expert opinion testimony is sufficient to withstand a motion for summary judgment, courts are required to undertake a detailed inquiry into the admissibility of the proffered testimony and, therefore, cannot summarily reject same without compelling reasons. See, Joiner v. General Electric Co., 78 F.3d 524, 529-534 (11th Cir. 1996); Ambrosini v. Labarraque, 966 F.2d 1464 (D.C. Cir. 1992); In Re Agent Orange Product Liability Litigation, 611 F. Supp. 1223, 1239 (S.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied sub nom, Lombardi v. Dow Chemical Co., 487 U.S. 1234, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988). In 1993, this Court decided the proper standards to be applied in assessing the reliability of expert testimony submitted on a motion for summary judgment in the case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). This Court rejected the application of the "Frye test" or the "general acceptance" test and stated that when faced with a proffer of expert scientific testimony, "the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Id., 125 L.Ed.2d at 482. The trial judges' task is to ensure that the expert's testimony rests both on "a reliable foundation and is relevant to the task at hand." Id., 125 L.Ed.2d at 485. This Court identified the following factors to consider in applying this two-prong test: a) the scientific methodology employed; b) whether the methodology or theory has been subjected to peer review and publication;

c) the known or potential rate of error; and d) the general acceptance of such methodology or theory within that community. Id., 125 L.Ed.2d at 482-83.

A careful review of the opinions of the Second Circuit and District Court in this case reveal absolutely no analysis relative to the admissibility or reliability of the opinions of petitioner's psychiatric medical opinion evidence or the facts upon which those opinions are founded. Without such an analysis, the lower courts were not free to summarily reject petitioner's medical evidence on a motion for summary judgment. Interestingly enough, respondent in this case never challenged the admissibility or reliability of petitioner's medical expert opinion evidence; nor did it attempt to contradict such evidence by way of any expert medical testimony to the contrary.

Based upon the foregoing, it is respectfully submitted that compelling grounds exist upon which to grant the instant petition for a writ of certiorari.

B] The Court of Appeals has so far departed and sanctioned the District Court's departure from the accepted and usual course of judicial proceedings relative to well-established principles of summary judgment by deciding the ultimate issues of fact concerning medical liability and foreseeability

The decisions of the Second Circuit, Connecticut Supreme Court, and District Court denying the existence of a duty to warn and a duty to control in this case were premised upon a finding that it was not foreseeable Doe would commit an act of violence or that decedent was within the class of foreseeable victims. However, these issues are issues of material fact and are medical questions not suited to resolution by lay persons. Consequently, they

should not be resolved in the context of a motion for summary judgment.

1. Foreseeability of Harm is a Question of Fact

In Connecticut, a duty to use care "may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act. [citations omitted]." Coburn v. Lenox Home's, Inc., 186 Conn. 370, 375, 441 A.2d 620 (1982). It has long been established that :

> " 'The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. Boticelli v. Winters, 125 Conn. 537, 542, 7 A.2d 443 (1939). By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result ?' Orlo v. Connecticut Co., 128 Conn. 231, 237, 21 A.2d 402 (1941)." Connecticut Savings Bank v. First National Bank & Trust Co., 138 Conn. 298, 303-04, 84 A.2d 267 (1951); See, Neal v. Shiels, Inc., [166 Conn. 3, 13, 347 A.2d 102 (1974)].

Frankovitch v. Burton, 185 Conn. 14, 20-21, 440 A.2d 254 (1981); see also, Doe v. British Universities N.A. Club, 788 F.Supp. 1286, 1292 (D. Conn. 1992).

The Connecticut Supreme Court has consistently held that :

> The issues of foreseeability and assumption of the risk . . . are ordinarily factual questions for the trier, becoming questions of law only when fair and reasonable persons could reach but one conclusion. Starkel v. Edward Balf Co., 142 Conn. 336, 342-43, 114 A.2d 199 (1955); Smith v. Leuthner, 156 Conn. 422, 424-25, 242 A.2d 728 (1968).

Abbott v. Bristol, 167 Conn. 143, 146, 355 A.2d 68 (1974); see also, Pisel v. Stamford Hospital, 180 Conn. 314, 332-33, 430 A.2d 1 (1980).[8] As an ultimate issue of fact, it cannot and should not have been decided by any court on a motion for summary judgment. The only way the rulings of the lower courts in this case, including the Second Circuit, can be sustained is if this Court concludes, based upon the entirety of the record before it, that fair and reasonable psychiatrists could reach but one conclusion--namely, that it was not reasonably foreseeable that Doe could become violent or dangerous or that he posed a threat to others around him.[9]

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[8] The Connecticut Supreme Court is by no means alone in holding the issue of foreseeability of harm to be a question of fact. See, Tinker v. U.S. by F.A.A., 982 F.2d 1456, 1469 (10th Cir. 1992) ("Foreseeability is an ultimate question of fact . . . "); Spencer v. Kroger Co., 941 F.2d 699, 703 (8th Cir. 1991) ("foreseeability . . . is now a question of fact to be determined by the totality of the circumstances"); Paulison v. Suffolk County, 775 F.Supp. 50, 54 (E.D.N.Y. 1991) (in the context of a duty to warn, what is foreseeable is subject to varying inferences and is a question of fact.)

[9] Connecticut's common law rule of foreseeability follows that of the minority in the case of Palsgraf v. Long Island R.Co., 248 N.Y. 339, 350-54, 162 N.E. 99 (1928). See Coburn v. Lenox Homes, 186 Conn. 370, 383, 441 A.2d 620, 627 (1982); Wright & Fitzgerald, Connecticut Law of Torts (3d Ed. 1991), Section 33 p. 59-60. Therefore, duty is not measured by the foreseeability of harm to a particular plaintiff but rather to a class of foreseeable victims of which plaintiff is a member. See, e.g., Jablonski By Pahls v. U.S., 712 F.2d

The facts in this case remain that petitioner submitted substantial, uncontroverted, psychiatric medical evidence which consistently revealed that "a reasonable psychotherapist should have recognized Doe as an individual with a propensity for violence" and that "Doe's belief that Fraser was involved in a British espionage plot . . . identified Fraser as a foreseeable victim." (App. E p. 45a). In fact, the underlying facts supporting these conclusions were best summarized by Associate Justice Berdon of the Connecticut Supreme Court in his dissenting opinion as follows:

> From 1974 to the time he fatally stabbed Fraser, Doe was continuously treated by the medical center on both an inpatient and an outpatient basis. The objective indicia of Doe's propensity to cause harm prior to his fatal stabbing of Fraser on June 17, 1985, which the Court of Appeals and this court find missing, is clearly set forth in the stipulation [of facts]. The stipulation provides: "Doe's psychiatric illness was first diagnosed in May, 1974, while he was in the Marines, as 'schizo-affective schizophrenia' by the Evans Mental Hygiene Clinic in

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391, 398 (9th Cir. 1983) (plaintiff was within class of foreseeable victims); Semler v. Psychiatric Institute of Washington D.C., 538 F.2d 121, 124-27 (4th Cir.), cert. denied, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976) (plaintiff was a member of the general public - i.e. class of foreseeable victims); Beck v. Kansas University Psychiatry Foundation, 580 F.Supp. 527, 540 (D.Kan 1984) (it is the risk to another or to others within the range of apprehension); Lipari v. Sears,, 497 F.Supp. 185, 194-95 (D.Neb. 1980) (plaintiffs were members of the class of foreseeable victims); Hamman v. Maricopa, 161 Ariz. 58, 775 P.2d 1122, 1127-28 (Ariz. 1989) (foreseeable victim is one within the zone of danger); Cain v. Rijken, 700 P.2d 1061, 1064 (Or. App. 1984) (plaintiff is one of the general class threatened); Peterson v. Washington, 671 P.2d 230, 237 (Wash. 1983) (defendant had duty to take precautions to protect anyone who might be endangered by psychiatric patient).

Okinawa . . . A portion of Doe's medical records for [the period from May, 1974, through September, 1979] describe[s] him to be suffering 'from a mental illness of psychotic proportions' . . . and having 'a very complex system of delusions involving his role as a special agent and a spy.' . . . Doe's diagnoses included, inter alia, schizophrenia, paranoid schizophrenia, and chronic paranoid schizophrenia . . . . Doe's medical records since May, 1974, detail many incidents where Doe describes himself as being involved in 'secret missions . . . for the [Central Intelligence Agency] and [the Federal Bureau of Investigation] involving secret rendezvous, stakeouts and top secret investigations' . . . and in violent confrontations, fights and killings involving knives and guns. Doe believed himself to be involved with the Mafia or to be [Frank] Serpico . . . Doe's therapists believed that these events were part of Doe's delusional thinking . . . [O]ne of Doe's medical records from [the medical center] in September, 1974, states: 'So far as is known, no behavioral acts of violence have occurred, however, the patient was noted in the service to go to the backs of theaters or other places and when inquiring about what he was doing at these places he reported that he was waiting for contacts so that at least to some extent this delusional system at times spilled over into behavior.' . . . Doe is described as dressing in unusual manner (i.e., 'superfly clothes,' army fatigues, long coats). . . . Doe's sister . . . reported incidents where she found Doe laughing out loud for no apparent reason while eating raw meat and holding a gun. . . . In September, 1976, Doe was arrested for carrying two loaded guns and a knife. . . . A hospital summary dated September 9, 1979, states that Doe had begun keeping loaded guns close to his bed and had carried them in public places

since the early 1970s." (Emphasis added.) These stipulated facts clearly reflect objective indicia of Doe's propensity to act on his delusions of violence and to harm others.

Furthermore, evidence that Doe's victim should have been foreseeable to the psychotherapists at the medical center was also clearly articulated in the stipulation. "The [medical center's] doctors knew that Doe possessed weapons and carried a knife and loaded guns because Doe's medical records make reference to such conduct. Doe's doctors cautioned him about the dangers associated with guns and/or advised him to get rid of them. . . . Doctors [James] Alexander and [Robert] Granacher [psychiatric experts retained by the plaintiff] have opined that in the months (April and May) and the weeks preceding the homicide, Doe's psychiatric condition was in a state of decompensation (Granacher testified 'massive decompensation'), he was psychotic, and, had the [medical center's psychiatric staff] asked the necessary questions as to how Doe was feeling -- if he was psychotic or having delusions and what he was thinking -- they would have discovered his state of decompensation. Doctor [Francis] Hamilton [a third psychiatrist who observed Doe, though not retained by the plaintiff as an expert] testified that on June 17, 1985, Doe was clearly psychotic. . . . Doctor Hamilton identified certain changes in Doe's life and emotional state in the weeks preceding the homicide, (Doe's medication was changed to Trilafon after he reported he had stopped taking Haldol, he had trouble sleeping, he became more convinced that Hector Fraser was part of a British plot). . . . Doctors Granacher and Alexander identified these factors as signs of decompensation. . . . Doctors Alexander and Granacher were of the opinion that Doe was potentially violent, a danger to others

> around him and that the [medical center] should have known of the dangers he posed. . . . Doctor Alexander opined that Hector Fraser, a Scottish immigrant, was an identifiable victim of what he opined was Doe's violent propensity. . . . Doctor Granacher opined that it was predictable that Doe would become violent [on or] about June 17, 1985, because of the amount of time it takes for the medication Doe had stopped taking approximately two and one-half weeks before the homicide to leave his body." (Emphasis added.) . . . Certainly, neither this court nor the Court of Appeals wants to imply that before a patient is deemed to have a propensity for violence he or she must have actually caused harm to another. Objective indicia of an individual's propensity to do violence to another may be revealed in forms other than specific acts or threats of violence. In this case, the medical center's well documented record indicates that Doe's habit of carrying a hunting knife (the weapon that was used by Doe to stab Fraser forty times) and loaded guns was known. Also known was the fact that Doe suffered from and acted on his delusions of being engaged in secret spy missions and in violent confrontations involving fights and killings.

(Id. at p. 42a-45a.)[10] Associate Justice Berdon concluded "there is sufficient evidence for a jury to conclude that Doe

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[10] No purpose would be served by also repeating the opinions and basis of the opinions of Doctors Granacher, Alexander and Hamilton which were detailed at length herein on pages 7-9. Rather, petitioner incorporates them herein by reference.

had a propensity for violence and that Fraser was a foreseeable victim." (Id. at p. 45a).[11]

Suffice it to say, the lower courts erroneously decided a material issue of fact in the face of substantial evidence to the contrary.

2. Lower Courts Substituted Their Opinions for Those of Medical Experts on a Medical Question of Fact

This Court in Addington v. Texas, 441 U.S. 418, 429, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) declared:

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[11] The factually indistinguishable case of Hamman v. Maricopa, 161 Ariz. 58, 775 P.2d 1122 (Ariz. 1989) demonstrates beyond peradventure the inappropriateness of summary judgment in this case. In Hamman, the parents of a schizophrenic child sued the county and treating psychiatrist for injuries the stepfather sustained after being attacked by the child only two days after defendant refused to hospitalize the child at the plaintiffs' urging. Id. at 1122-24. Defendants had argued that there was no duty to commit the patient because the treating psychiatrist found him not to be dangerous. However, the Arizona Supreme Court rejected defendants' argument, reversed the trial cout's grant of summary judgment, and reasoned:

> The plaintiffs however, submitted evidence from two psychiatrists in opposition to defendants' motion for summary judgment. The plaintiffs' psychiatrists, in their affidavits, stated that a competent examination and proper diagnosis would have disclosed that [the patient] was a person suffering from a mental illness which made him dangerous to others. He was, therefore, admittable to the hospital on an involuntary basis under the statutes. They further stated that defendants' examination of the patient fell below the acceptable standard for psychiatrists. The issue of ability to control is one which must be decided at trial.

[Emphasis added] Id. at 1128.

> Whether an individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.

This principle[12] was best summarized in the case of McGrady v. United States, 650 F.Supp. 379, 387 (D.S.C. 1986), which respondent has often cited, as follows:

> Because of the elusive qualities of mental disorders and the difficulty of analyzing and evaluating them . . . the determination of whether or not a chosen course of diagnosis or treatment is appropriate in the practice of psychiatry is normally "outside the realm of ordinary lay knowledge" . . .. Expert testimony is generally necessary for determining the competency of a psychiatrist's diagnosis and the soundness of his professional judgment. [citations omitted].

In the case at bar, the lower courts consistently rejected the opinions of plaintiff's psychiatric experts and found to the contrary. Their holdings are even more astounding given the fact that defendants failed to present psychiatric expert evidence by way of affidavits, deposition transcript or otherwise, to rebut the testimony of Doctors Alexander,

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[12] See also, Jablonski By Pahls v. U.S., 712 F.2d 391, 398 (9th Cir. 1983); Tarasoff v. Regents of University of California, 17 Cal.3d 425, 551 P.2d 334, 345-46 (Cal. 1976); Perreira v. Colorado, 768 P.2d 1198, 1216-18 (Colo. 1980); Bradley Center, Inc. v. Wessner, 161 G. Apps. 576, 287 S.E.2d 716, 720-21 (Ga. App.), aff'd, 250 Ga. 199, 296 S.E.2d 693 (Ga. 1982). Durflinger v. Artiles, 234 Kan. 484, 673 P.2d 86, 92-93 (Kan. 1983); McIntosh v. Milano, 168 N.J.Super. 466, 403 A.2d 500, 507-08, 511 (N.J. Super. 1979); Peck v. Counseling Service of Addision County, 146 Vt. 61, 499 A.2d 422, 425-26 (Vt. 1985).

Hamilton or Granacher. (Appendix C p. 22a-23a, par. 22). Clearly, the lower courts here substituted their lay opinions for those of qualified experts in an area reserved for the experts and without the aid of supporting expert testimony.

To the extent the Second Circuit's requirement of "objective indicia of a patient's propensity to cause harm" is seen as requiring the commission of a prior act of violence or specific threats of harm, nevertheless, such a requirement is contradicted by the record before this Court. Dr. Robert Granacher specifically testified that although the commission of prior violent acts is a factor in predicting future violence, a psychiatrist has the tools available to detect a patient's violent propensities even if the patient never committed an act of violence in the past. (Jt. A. p. 931-941).

Similarly, this notion has been rejected by numerous jurisdictions, including the Colorado Supreme Court which held :

> The absence of specific threats or overt violent behavior . . . is not necessarily conclusive on the issue of a patient's lack of propensity for violent conduct. The patient's history of behavioral disorders and present mental condition may be such that, notwithstanding the absence of specific threats and past or present violent behavior, a reasonably competent psychiatrist utilizing accepted diagnostic criteria, would conclude that the patient's mental condition is such as to render the patient disposed to commit violent acts against others. Under such circumstances, the psychiatrist would be obligated to take reasonable precautions consistent with accepted psychiatric standards of practice to protect potential victims from the patient's propensity for violence.

Perreira v. Colorado, 768 P.2d 1198, 1214 (Colo. 1989); see also Jablonski By Pahls v. United States, 712 F.2d 391, 398 (9th Cir. 1983); Hamman v. Maricopa, 161 Ariz. 58, 775 P.2d 1122, 1127-28 (Ariz. 1989); Hedlund v. Superior Court of Orange County, 34 Cal.3d 695, 194 Cal. Rptr. 805, 669 P.2d 41, 46-47 (Cal. 1983); Lundgren v. Fultz, 354 N.W.2d 25, 29 (Minn. 1984).

In light of the foregoing, it is clear that the Second Circuit and District Court in this case decided a material issue of fact and substituted their own lay opinions on a medical question for those of qualified experts. As such, they have violated well-established principles of law relative to summary judgment. Accordingly, substantial grounds exist warranting the grant of this petition for a writ of certiorari.

CONCLUSION

For all of the reasons cited above, it is respectfully submitted that compelling reasons exist warranting a full review of the Second Circuit's decision affirming the grant of summary judgment in favor of respondent. Consequently, petitioner respectfully requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

MICHAEL P. KOSKOFF
Koskoff, Koskoff & Bieder, P.C.
Attorneys for the Petitioner
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421

MARK C. DURKIN
Effron & Durkin, P.C.
Of Counsel

APPENDIX A - OPINION OF THE COURT OF APPEALS SECOND CIRCUIT AFFIRMING JUDGMENT FOR DEFENDANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1495--August Term 1993

Argued: May 13, 1994 Decided: May 13, 1996

Certified Question
Answered: April 16, 1996

Docket No. 93-6334
83 F.3d 591

AGNES FRASER, EXECUTRIX OF THE
ESTATE OF HECTOR FRASER,

Plaintiff-Appellant,

--v.--

UNITED STATES OF AMERICA

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge*,
JACOBS and LEVAL, *Circuit Judges*.

Appeal from the November 16, 1993, judgment of the United States District Court for the District of Connecticut (Warren W. Eginton, Judge) dismissing a suit against the United States, brought under the Federal Tort Claims Act.

Affirmed.

MICHAEL P. KOSKOFF, Bridgeport, Conn. (Mark C. Durkin, Koskoff, Koskoff & Bieder, Bridgeport, Conn., on the brief), *for the plaintiff-appellant.*

NANCY L. GRIFFIN, Asst. U.S. Atty., New Haven, Conn. (Christopher F. Droney, U.S. Atty., New Haven, Conn., on the brief), *for defendant-appellee.*

(WILLIAM B. WYNNE, Middletown, Conn., submitted a brief for *amicus curiae* Connecticut Legal Rights Project, Inc.).

PER CURIAM:

On this appeal from a judgment of the District Court for the District of Connecticut (Warren W. Eginton, Judge), dismissing a suit against the United States, brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680 (1994), we certified two questions of Connecticut law to the Connecticut Supreme Court ("the Court"). *See Fraser v. United States*, 30 F.3d 18 (2d Cir. 1994). After some delay occasioned by the Court's request for a certification of a statement of the relevant factual circumstances and the parties' efforts to agree on

an appropriate response to the Court's request, the matter was ultimately argued before the Court on December 5, 1995, and a decision was released on April 16, 1996.

After slightly reformulating the two questions we certified into one question -- "In the circumstances of this case, does a psychotherapist have a duty to control a patient being treated on an outpatient basis in order to prevent harm to third persons?" -- the Court answered the question in the negative. *Fraser v. United States*, 236 Conn. 625, 627 & n.3 (1996). Since Connecticut law governs the substantive issues of liability in this FTCA suit, the Court's authoritative ruling on Connecticut law defeats the plaintiff's claim that the United States is liable for the death of plaintiff's decedent because employees of the West Haven Veteran's Administration Medical Center breached a duty of control alleged to be owed to the plaintiff's decedent.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX B - INTERLOCUTORY ORDER OF SECOND CIRCUIT CERTIFYING QUESTIONS OF LAW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1495--August Term 1993

Filed: July 15, 1994
Docket No. 93-6334
30 F.3d 18

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of July, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE DENNIS G. JACOBS
HONORABLE PIERRE N. LEVAL
Circuit Judges.

AGNES FRASER, EXECUTRIX OF THE
ESTATE OF HECTOR FRASER,
Plaintiff-Appellant,

--v.--

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

This appeal from the United States District Court for the District of Connecticut (Warren W. Eginton, Judge), came on to be heard on the transcript of record from said district court, and was argued by counsel. On consideration of the briefs, appendix, record, and oral argument in this appeal, it is hereby ORDERED that the Clerk of this Court transmit to the Clerk of the Connecticut Supreme Court a Certificate in the form attached, together with a complete set of the briefs, appendix, and record filed with this Court by the parties. This panel retains jurisdiction so that, after we receive a response from the Connecticut Supreme Court, we may dispose of the appeal. The parties are hereby ordered to bear equally such fees and costs, if any, as may be requested by the Connecticut Supreme Court.

/s/ JON O. NEWMAN
Chief Judge.

/s/ DENNIS G. JACOBS (per J.O.N.)

/s/ PIERRE N. LEVAL (per J.O.N.)
Circuit Judges.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1495--August Term 1993

Filed: July 15, 1994
Docket No. 93-6334
30 F.3d 18

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of July, one thousand nine hundred and ninety-four.

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HONORABLE PIERRE N. LEVAL
Circuit Judges.

AGNES FRASER, EXECUTRIX OF THE
ESTATE OF HECTOR FRASER,
Plaintiff-Appellant,

--v.--

UNITED STATES OF AMERICA,
Defendant-Appellee

ORDER

Certificate to the Connecticut Supreme Court pursuant to Local Rule § 0.27 and Conn. Gen. Stat. § 51-199a.

This litigation arises from an episode in which a mental patient fatally stabbed his employer. On June 17, 1985, Hector Fraser ("Hector") was stabbed 37 times by his employee John Doe,[1] and Hector died the next day from the resulting wounds. Plaintiff Agnes Fraser, as executrix of Hector's estate, has brought this action under the Federal Tort Claims Act, alleging that the negligence of defendant United States through its employees at the West Haven Veteran's Administration Medical Center ("VAMC") led to this fatal stabbing.

John Doe first came under the psychiatric care of the United States while serving in the Marine Corps. Diagnosed as psychotic, suffering from schizophrenia, and experiencing delusions that included incidents of violence, Doe was discharged from the military in September 1974. Upon his discharge, Doe returned home to Connecticut and began outpatient treatment at VAMC. From 1976 to 1978, Doe lived in various parts of the country and was treated at least twice on an inpatient basis in California. Having returned to Connecticut, Doe was a voluntary inpatient at VAMC for six month in 1979. Thereafter, through the time of his stabbing of Hector, Doe received outpatient treatment at VAMC. Though Doe continued to suffer from delusions that included violent images over this period, there is no clear evidence that he ever threatened or harmed anyone prior to the time he stabbed Hector. On

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[1] The District Court granted Doe's request for the substitution of a fictitious name to protect his confidentiality.

June 6, 1985, Doe reported to the staff at VAMC that he had stopped taking his medication, and the doctors convinced him to take another form of medication. On Doe's visit to VAMC the next week, his last visit before the June 17 stabbing, Doe reported that he was feeling better on the new medication.

The plaintiff's complaint alleged that Hector's death was "caused by the carelessness, negligence and malpractice" of the defendant. Specifically, the plaintiff claims that VAMC (1) failed to properly treat, diagnose, and monitor Doe, (2) failed to warn others of Doe's violent propensity, and (3) failed to take reasonably necessary actions to control Doe in order to protect others. The District Court, applying Connecticut law, which both parties agree governs the substantive issues of liability in this Federal Tort Claims Act suit, granted the defendant's motion for summary judgment, holding that, as a matter of law, VAMC owed no duty to control Doe or to warn Fraser about Doe. In the absence of either of these two duties, the Court implicitly concluded that there was no failure to treat, diagnose, or monitor.

With respect to the cause of action premised on a breach of a duty to warn Hector, we are inclined to agree with the District Court reasoning as expressed in Judge Eginton's decision dated November 16, 1993. The Court found as a matter of law that VAMC had no duty to warn Hector about Doe because, even viewing the facts most favorably to the plaintiff on the defendant's motion for summary judgment, the evidence did not show that it was foreseeable that Doe would commit an act of violence against Hector. The plaintiff asserts that her claim premised on the duty to warn should reach the jury because she presented expert opinion testimony to the effect that the psychiatric staff at VAMC would have discovered a threat of harm to Hector if the staff had asked

Doe the right questions. However, in the absence of any objective indicia of a patient's propensity to cause harm, we are unwilling to conclude that, under Connecticut tort law, a claim alleging a breach of a duty to warn should reach a jury solely on the basis of expert opinion testimony suggesting that more searching questioning by the defendant psychotherapist would have revealed the patient's otherwise unforeseeable potential for harm.

With respect to the cause of action premised on a breach of a duty to control, however, we are in some doubt. Recognizing that the pertinent legal issues were a matter of first impression in Connecticut, the District Court noted that the Connecticut cases considering the duty to control the conduct of others have followed the Restatement (Second) of Torts §§ 315-319 (1965). Section 315 of the Restatement implies that there is a duty to prevent a third person from causing physical harm when "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct".[2] Section 319 provides that "[o]ne who *takes charge* of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing

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[2] Quoted in full, Restatement (second) of Torts S 315 reads:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

harm." Restatement (Second) of Torts § 319 (emphasis added). As noted by the Connecticut Supreme Court in *Kaminski v. Town of Fairfield*, 578 A.2d 1048, 1051 (Conn. 1990), "Both of the illustrations to § 319 deal with the liability of institutions, such as hospitals, that have formal custodial responsibilities of those in their charge." Relying on these authorities, the District Court held that a voluntary *outpatient* relationship, such as Doe's, is not a "special relationship that would impose on VAMC a duty to control Doe to protect the public at large.

The plaintiff contends that, even in the absence of a custodial or inpatient relationship, the right or ability to control a third person's conduct is sufficient to give rise to a "special relationship" for purposes of section 315. The plaintiff argues that VAMC had the ability to "control" Doe's tendency to violence even as an outpatient, by such measures as treating and medicating, or by seeking involuntary civil commitment under Conn. Gen. Stat. § 17a-502. It asserts that VAMC therefore had a duty to "control" Doe to prevent him from harming third persons.

As the parties concede and as the District Court noted, there are not Connecticut state cases considering whether a third party attacked by a mental patient may have any causes of action against the patient's psychotherapist. Two Connecticut cases of arguable relevance, *Kaminski v. Town of Fairfield, supra*, and *Kargul v. Sandpiper Dunes Limited Partnership*, 1991 WL 28051 (Conn. Super. CT. Jan. 29, 1991), do not provide significant insight into Connecticut's views as to whether a psychotherapist could have a duty to control a patient being treated on an outpatient basis.[3] Moreover, there appears to be a split of

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[3] In *Kaminski*, the Connecticut Supreme Court held that the parents of an adult mental patient who injured a police officer did not have an ability to control their child and had not breach a duty to

authority in the law of other jurisdictions as to whether a psychotherapist-outpatient relationship could be considered "special" so as to create a potential duty on the part of the psychotherapist to control the patient. *Compare Peck v. Counseling Service of Addision County, Inc.*, 499 A.2d 422, 425 (Vt. 1985) *and Lundgren v. Fultz*, 354 N.W.2d 25, 27-29 (Minn. 1984) *with Santa Cruz v. Northwest Dade Community Health Center, Inc.*, 590 So. 2d 444, 445-46 (Fla. Dist. Ct. App. 1991), *review denied*, 559 So.2d 1278 (Fla. 1992).

We recognize that the claims asserted in this litigation are not likely to arise frequently, a circumstance that weighs against use of the certification procedure. On the other hand, the claims implicate important values in the evolution of a state's tort law, a circumstance that weighs in favor of at least affording the pertinent state supreme court an opportunity to determine state law authoritatively, if it wishes to do so.

Under all the circumstances, we certify the following questions of law to the Connecticut Supreme Court:

1. Does Connecticut recognize a general duty on the part of a psychotherapist to control a patient being treated on an outpatient basis in order to prevent harm to third persons ?

2. If so, do the allegations of the complaint in the pending case, as amplified by the submissions of

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warn. *See* 578 A.2d at 1051-54. In *Kargul*, a Connecticut Superior Court held that a tenant in an apartment building had a basic duty to take reasonable precautions to protect other tenants when she allowed a potentially dangerous person to reside with her. *See* 1991 WL 28051, at *11.

the plaintiff in opposition to the defendant's motion for summary judgment, present a triable jury issue ?

Though certifying to the Supreme Court the questions as framed above, we also wish to make clear that we have no desire to restrict the Supreme Court from considering any state law issues that it might wish to resolve in connection with this appeal. Therefore, though our immediate request is for answers to the questions as framed, we would welcome any guidance the Supreme Court might care to provide with respect to any state law issues presented by this appeal.

FOR THE COURT

/s/GEORGE LANGE III
George Lange, III, *Clerk*

APPENDIX C - JOINT STATEMENT OF FACTS SO ORDERED BY THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
MAR 10 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

AGNES FRASER,EXECUTRIX OF Estate of Hector Fraser,	)
Plaintiff-Appellant	) Docket No. 93-6334
vs.	)
UNITED STATES OF AMERICA,	) March 3, 1995
Defendant-Appellee.	)

The following joint statement of facts is offered for the purposes of enabling the Connecticut Supreme Court to decide the question which was accepted on certification. By agreeing to this joint statement, the United States does not admit that the plaintiff has proffered evidence in opposition to the government's motion for summary judgment sufficient to raise a genuine issue of material fact.

JOINT STATEMENT
OF RELEVANT FACTUAL CIRCUMSTANCES

1. On June 17, 1985, John Doe attacked his employer, Hector Fraser, and fatally stabbed him approximately forty times. (A. p. 675-77, 732-39, 756).

2. At the time of the attack, Doe was under the care and treatment of the Veterans Affairs Medical Center located in West Haven, Connecticut (hereinafter "West Haven VA") for a serious

Notice sent: 5/15/95
Koskoff, Koskoff & Bieder,P.C.
Christopher F. Droney, United States Attorney
Nancy L. Griffin, Assistant United States Attorney

psychiatric illness which dated back to the early 1970's when Doe was in high school. (A. p. 50-52, 158-60, 375, 417-18). The West Haven VA was owned and operated by the United States Department of Veteran Affairs.

3. Doe's psychiatric illness was first diagnosed in May, 1974, while he was in the Marines, as "schizo-affective schizophrenia" by the Evans Mental Hygiene Clinic in Okinawa.

4. Between May, 1974, and September, 1979, Doe was treated by four medical facilities operated under the auspices of the United States including the West Haven VA. (A. 51-52, 68-80, 126-37, 158-59, 182-84, 277-94). Doe was treated by these United States' facilities on an outpatient basis except for the following periods where he was treated on an inpatient basis:

May 25, 1974 through June 28, 1974;
November 8, 1976 through November 16, 1976;
December 12, 1976 through December 30, 1976;
and
December 13, 1977 through March 24, 1978.

5. A portion of Doe's medical records for this period describe him to be suffering "from a mental illness of psychotic proportions" (A. p. 70) and having "a very complex system of delusions involving his role as a special agent and a spy." (A. p. 137). Doe's diagnoses included, inter alia, schizophrenia, paranoid schizophrenia, and chronic paranoid schizophrenia. (A. p. 51-52, 126-31, 137, 182).

6. From September, 1979, through June 17, 1985, the West Haven VA provided continuous care to Doe for his psychiatric illness on an outpatient basis. (A. p. 52-53, 185-232). Between October 3, 1980, and June 13, 1985, Doe voluntarily appeared at the West Haven VA sixty-one times for treatments and consultations. (i.e., averaging more than one visit per month). (A. p. 196-222).

7. Doe's medical records since May, 1974, detail many incidents where Doe describes himself as being involved in "secret missions . . . for the CIA and FBI involving secret rendevous (sic), stakeouts and top secret investigations" (A. p. 68-69), and in violent confrontations, fights and killings involving knives and guns. Doe believed himself to be involved with the Mafia or to be Serpico (A. p. 126-37). Doe's therapists believed that these events were part of Doe's delusional thinking. (A. p. 94-106, 136-37). However, one of Doe's medical records from the West Haven VA in September 1974 states:

> So far as is known, no behavioral acts of violence have occurred, however, the patient was noted in

> the service to go to the backs of theatres (sic) or other places and when inquiring (sic) about what he was doing at these places he reported that he was waiting for contacts so that at least to some extent this delusional system at times spilled over into behavior. (A. p. 138).

Doe was separated from the service in 1974. (A. p. 373).

8. Doe is described as dressing in unusual manners (i.e., "superfly clothes", army fatigues, long coats). (A. p. 126, 129). Doe's sister, Joanne Baker, reported incidents where she found Doe laughing out loud for no apparent reason while eating raw meat and holding a gun. (A. p. 446, 452, 480, 483, 785).

9. In September, 1976, Doe was arrested for carrying two loaded guns and a knife. (A. p. 126, 957-58). A hospital summary dated September 9, 1979, states that Doe had begun keeping loaded guns close to his bed and had carried them in public places since the early 1970's. (A. 182-84). On March 2, 1979, Doe was arrested for stealing $157.00 from his employer. (A. p. 182).

10. The West Haven VA doctors knew that Doe possessed weapons and carried a knife and loaded guns because Doe's medical records make reference to such conduct. Doe's doctors cautioned him about the dangers associated with guns and/or advised him to get rid of them. (A. pp. 198, 212-14, 215, 216, 217, 218).

11. Doe had a long standing relationship with Hector Fraser and his family. Doe first worked for Hector Fraser as a teenager. In 1981 or 1982, Doe began work with Mr. Fraser again. (A. pp. 607. 609-610) Fraser's son John also worked in the business. Doe reported to the Fraser home in the morning. From there, Hector or John Fraser

would drive Doe to the job site. During this period, there were occasions when Doe joined the Frasers for dinner or watched television with Mr. Fraser. John indicated that the three would work out in the field together. (A. 599, 600, 639).

12. John recalls that as far back as 1981, Doe habitually wore an 8" buck knife and on occasion carried a 4" pocket knife. (A. pp. 630-631). John reports that Doe talked of spies, but he does not recall Doe ever saying that John or Hector Fraser or anyone in Hector Fraser's company was a spy. (A. pp. 629-630). There is no evidence in the record that John Doe ever threatened Hector Fraser or his family.

13. Plaintiff has offered the expert opinions of two psychiatric experts, Dr. Robert Granacher and Dr. James Alexander. Plaintiff also relied upon the statements and observations of a third psychiatrist, Dr. Francis Hamilton.

14. Dr. Alexander was the staff psychiatrist for the Bridgeport Correctional Center who treated Doe from June 27, 1985, upon his arrival at the correctional center, through January 9, 1986. (A. pp. 746-747, 1026-27). Dr. Hamilton was the psychiatrist who treated Doe from June 17, 1985, upon his admission to Norwalk Hospital immediately after the homicide, through June 25, 1985. (A. p. 1090-1096). Dr. Hamilton was not retained by plaintiff as an expert.

15. Doctors Alexander and Granacher have opined that in the months (April and May) and the weeks preceding the homicide, Doe's psychiatric condition was in a state of decompensation (Granacher testified "massive decompensation"), he was psychotic, and, had the defendant asked the necessary questions as to how Doe was feeling -- if he was psychotic or having delusions and

what he was thinking -- they would have discovered his state of decompensation. (A. p. 747-50, 751-54, 962-63, 973-74, 980-82, 986-90, 1052-70). Dr. Hamilton testified that on June 17, 1985, Doe was clearly psychotic. (A. p. 1091-1103). Doctor Hamilton identified certain changes in Doe's life and emotional state in the weeks preceding the homicide, (Doe's medication was changed to trilafon after he reported he had stopped talking haldol, he had trouble sleeping, he became more convinced that Hector Fraser was part of a British plot). (A. pp. 1091-1103). Doctors Granacher and Alexander identified these factors as signs of decompensation.

16. Doctors Alexander and Granacher were of the opinion that Doe was potentially violent, a danger to others around him and that the defendant should have known of the dangers he posed. (A. p. 750-55, 796-99, 815-17, 964-65, 968-91, 993-94, 1030, 1034-36, 1048-49, 1058-59, 1064-70). Dr. Alexander opined that Hector Fraser, a Scottish immigrant, was an identifiable victim of what he opined was Doe's violent propensity. (A. p. 751 par. 27, 753-54 par. 40-41, p. 1088). Dr. Granacher opined that it was predictable that Doe would become violent in and about June 17, 1985, because of the amount of time it takes for the medication Doe had stopped taking approximately two and one-half weeks before the homicide to leave his body. (A. p. 988-91).

17. Doctors Alexander and Granacher, individually and/or collectively, opined that defendant departed from the accepted standards of care in the following ways:

a. failing to undertake a proper mental evaluation and assessment of Doe by not asking the appropriate questions of Doe as to how he was feeling, what he was thinking, and whether he was having delusions (A. p. 958, 961, 964-65, 968, 980, 982-83, 996-98, 1049-51, 1054,

1057-59, 1060-61, 1067); and failing to have recognized, monitored and properly treated the decompensation in Doe's condition so as to prevent him from becoming psychotic in the weeks prior to the homicide (A. p. 751, 992);

b. failing to speak with Doe's family as to his mental condition and by relying solely upon Doe for all information as to his mental condition (A. p. 961-63, 972-74, 984, 993, 1003, 1051052, 1065, 1067);

c. failing to keep complete and accurate notes and records regarding Doe's treatments and consultations (A. p. 751, 963-64, 980-81, 1001, 1050, 1052, 1061);

d. making a substantial reduction in Doe's anti-psychotic medication in the weeks prior to the homicide, making it without proper observation or on an inpatient basis, selecting an improper or inappropriate substitute medication (i.e. Trilafon), and failing to have utilized injectable forms of antipsychotic medications. (A. p. 751, 752, 753, 962, 982, 986-92, 994, 998-99, 1004, 1050, 1052, 1061, 1063-67);

e. failing to have made an assessment as to whether or not Doe was a danger to himself or others in the months preceding the homicide as required by the civil commitment statute. (A. p. 747-50, 752-53, 969-77, 984, 990-991, 993, 1003);

f. failing to properly supervise and monitor Doe's treating physicians and allowing rotating physicians to treat Doe. (A. p. 751, 753, 994, 998-99).

g. failing to have removed Doe's guns and knives (A. p. 960, 982);

h. violating its own internal policies and procedures by not re-evaluating Doe's medications every six months (A. p. 994-96); and

i. not involuntarily committing Doe in June, 1985 or encouraging him to voluntarily submit to inpatient care. (A. p. 750-52).

18. Doctors Alexander and Granacher opined that each of the departures they identified were substantial factors in causing the injuries to and death of Hector Fraser. (A. p. 754 par. 42-43, 1000).

19. Individually and or collectively, Doctors Alexander and Granacher were of the opinion that defendant had the ability to have controlled Doe by prescribing a more appropriate course of treatment, in one or more of the following ways:

a. maintained Doe on Haldol, changed his medication to an appropriate level of a drug other than Trilafon (i.e., Prolixin or Haldol D), prescribed an injectable form of an anti-psychotic mediation, and/or changed to Trilafon on an inpatient basis or with closer outpatient monitoring (A. p. 749-52, 962, 986094, 1002-1003, 1049-52, 1059-67);

b. required Doe, as a condition of his outpatient living, to forfeit his weapons (A. p. 960, 982);

c. monitored Doe's daily activities more closely through more frequent follow up visits and seeking the involvement and participation of Doe's family (A. p. 751, 961-63, 972-74, 984, 992-93, 1003, 1051-52, 1060-61, 1064-67, 1073);

d. reduced Doe's stress and anxiety levels by not rotating his treating physicians (A. p. 751-53, 1003-1005);

e. encouraged Doe to voluntarily submit himself to inpatient care in June, 1985. (A. p. 751);

f. exercised its right to involuntarily commit Doe for a 15-day period under General Statutes Section 17a-502. (A. p. 1066-70); or

g. warned Hector Fraser, Doe's family, or the police of Doe's state of decompensation, potential for violence and of his increased belief that Hector Fraser was a spy for British intelligence. (A. p. 1036-38, 1086-87, 1091-95, 1102-04).

20. Dr. Orrok, a third-year resident physician, treated Doe at the West Haven VA on June 13, 1985, which was the last time Doe was treated by the West Have VA prior to the homicide. Prior to the 13th Dr. Orrok treated Doe on an individual basis on four occasions between August 1984 and June 13, 1985. (A. p. 220-222). Doe was seen on sixty occasions at the West Haven VA between October 1980 and June 1985. (A.p. 196-222, Orrok depo. pp. 63-66).

21. During her deposition taken on September 27, 1988, Dr. Orrok states that she made a determination that Doe was not homicidal. Dr. Orrok also stated the following at her deposition :

a. "I would bet I did not" know on 6/13/85 whether or not John Doe had any past history of violent behavior;

b. "I would bet I did not" ask him whether or not he was having delusions;

c. "I would be almost certain I did not" ask him whether he was having hallucinations;

d. "I am certain I did not" ask him whether or not he intended to harm anybody;

e. it "was my assumption" that Doe was paranoid on June 13, 1985;

f. she knew "that [Doe] would not be the kind of person that would voluntarily give [her] information";

g. "I did not ask him if he was homicidal . . . I chose not to ask him whether or not he was homicidal because I made a hierarchy of what I felt was most likely to be important and relevant to him at that time."

(A. p. 812-13).

22. The defendant did not offer the testimony of a psychiatric expert in support of its motion for summary judgment. The government contends that expert testimony is not necessary to decide the issue of whether a duty existed running from the defendant to plaintiff's decedent.

Respectfully submitted,

THE PLAINTIFF-APPELLANT

/s/Michael P. Koskoff
Michael P. Koskoff
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421

A TRUE COPY
GEORGE LANGE III, CLERK
s/George Lange III

THE DEFENDANT-APPELLEE
/s/Nancy L. Griffin
Nancy L. Griffin
Assistant U.S. Attorney
U.S. Attorney's Office
157 Church Street
P. O. Box 1824
New Haven, CT 06508
(203) 773-2108

UNITED STATES COURT OF APPEALS
FILED
MAY 11, 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

SO ORDERED:
FOR THE COURT.
GEORGE LANGE III, Clerk
By: s/Kathy Brouwer
Kathy Brouwer, Operations Mgr.
s/5-11/-95
(Date)

APPENDIX D - ORDER OF CONNECTICUT SUPREME COURT DENYING REARGUMENT/RECONSIDERATION

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 15035

AGNES FRASER, EXECUTRIX OF THE ESTATE OF HECTOR FRASER

v.

UNITED STATES OF AMERICA : MAY 20, 1996

O R D E R

THE MOTION OF THE PLAINTIFF, FILED APRIL 25, 1996, FOR REARGUMENT OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D **DENIED**. BERDON, J., WOULD GRANT.

BY THE COURT,

s/Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 5/20/96
KOSKOFF, KOSKOFF & BIEDER, P.C.
SUSAN Q. COBB, ASSISTANT ATTORNEY GENERAL
LANSING E. CRANE
CARMODY & TORRANCE
CONNECTICUT LEGAL RIGHTS PROJECT, INC.
CHRISTOPHER F. DRONEY, UNITED STATES ATTORNEY
NANCY L. GRIFFIN, ASSISTANT UNITED STATES

ATTORNEY, PRO HAC VICE
CARL J. SCHUMAN, ASSISTANT UNITED STATES ATTORNEY
CLERK, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
HON. JON O. NEWMAN
HON. DENNIS G. JACOBS
HON. PIERRE N. LEVAL
RJD 220

APPENDIX E - CONNECTICUT SUPREME COURT DECISION ON CERTIFIED QUESTION OF LAW

STATE OF CONNECTICUT
SUPREME COURT

AGNES FRASER, EXECUTRIX (ESTATE OF HECTOR FRASER) *v.* UNITED STATES OF AMERICA
(15035)

Peters, C.J., and Callahan, Borden, Berdon and Katz, Js.

The plaintiff, the executrix of the estate of F, brought an action in the United States District Court against the defendant United States to recover for F's wrongful death. She alleged that the negligence of psychotherapists in treating D, an outpatient at a federally operated medical center, resulted in the fatal stabbing of F by D. The plaintiff claimed that the medical center was negligence in that it failed to warn others of D's violent propensities and failed to take reasonably necessary actions to control D to protect others. The District Court granted the defendant's motion for summary judgment because, in its view of the undisputed facts, there was no duty owed to F. The plaintiff appealed to the United States Court of Appeals for the Second Circuit, which agreed that there was no duty to warn, but asked this court to decide whether there was also no duty to control D's conduct so as to avoid harm to F. *Held* that, under the circumstances here, there was no duty to control D to prevent his assault on F; D was not known to have been dangerous, and the medical center neither knew nor had reason to know that he would attack F because F was not an identifiable victim, a member of a claim of

identifiable victims or within the zone of risk to an identifiable victim.

(One justice dissenting)

Argued December 5, 1995-officially released April 16, 1996

Action to recover damages for the personal injuries and subsequent death of the plaintiff's decedent allegedly caused by the defendant's negligence, brought to the United States District Court for the District of Connecticut, where the court, *Eginton, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to the United States Court of Appeals for the Second Circuit, *Newman, C.J.*, and *Jacobs* and *Leval, Js.*, which affirmed in part the District Court's judgment and certified the question of law to this court regarding whether a psychotherapist has a duty to control a patient being treated on an outpatient basis in order to prevent harm to third persons.

Michael P. Koskoff, with whom was *Mark C. Durkin*, for the appellant (plaintiff).

Carl Schuman, assistant United States attorney, with whom were *John B. Hughes*, assistant United States attorney, and, on the brief *Christopher F. Droney*, United States attorney, and *Nancy L. Griffin*, assistant United States attorney, for the appellee (defendant).

Richard Blumenthal, attorney general, and *Susan Quinn Cobb*, assistant attorney general, filed a brief for the department of mental health and addiction services as amicus curiae.

William I. Garfinkel, Brian R. Shagan and *James Smart,* law student intern, filed a brief for the Mental Health Association of Connecticut, Inc., as amicus curiae.

Lansing E. Crane filed a brief for the Connecticut Psychiatric Society as amicus curiae.

Thomas A. Behrendt, William Emmett Dwyer and *William B. Wynne* filed a brief for the Center for Independent Living of Southwestern Connecticut et al. as amici curiae.

PETERS, C.J. In this case, certified from the United States Court of Appeals for the Second Circuit, we have agreed to decide whether, in the circumstances presented herein, psychotherapists undertaking the treatment of a psychiatric outpatient assumed a duty to exercise control over the patient to prevent the patient from committing an act of violence against a third person. The plaintiff, Agnes Fraser, executrix of the estate of Hector Fraser, brought an action in the United States District Court for the District of Connecticut against the defendant, the United States of America, acting through its employees at the West Haven Veterans Administration Medical Center (medical center). The plaintiff alleged that she was entitled to damages, under the Federal Tort Claims Act; 28 U.S.C. § 2671 et seq.; because the medical center's negligent treatment of John Doe,[1] an outpatient there, resulted in the fatal stabbing of her decedent. The plaintiff claimed that the medical center was negligent in its treatment of Doe because it had failed to warn others of his violent propensities and had failed to take reasonably necessary actions to control him in order to protect others. The

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[1] The District Court granted Doe's request to have his real name deleted from the court's record.

District Court granted the defendant's motion for summary judgment because, in its view of the undisputed facts, the medical center owed no duty to the plaintiff's decedent. The plaintiff appealed to the United States Court of Appeals for the Second Circuit, which agreed with the District Court that the medical center had no duty to warn the plaintiff's decedent, but asked this court to decide whether the medical center had a duty to control Doe's conduct to avoid harm to the plaintiff's decedent. Pursuant to the applicable certification procedures; General Statutes § 51-199a;[2] we agreed to decide this issue.[3] We conclude that the medical center had no duty to control its outpatient, Doe, to avoid personal injury to unidentifiable third persons such as the plaintiff's decedent and, therefore, answer the certified question in the negative.

The record before the District Court establishes the following undisputed facts. Doe had a longstanding, friendly relationship with the plaintiff's decedent, Hector Fraser (Fraser). When Doe was a teenager, he worked at a floor covering store that Fraser then owned. After Doe's release from military service, he again worked for Fraser as

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[2] General Statutes § 51-199a provides in relevant part: "Short title: Uniform Certification of Questions of Law Act. (a) This section may be cited as the 'Uniform Certification of Questions of Law Act'.

"(b) The supreme court may answer questions of law certified to it by . . . a court of appeals of the United States . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state."

[3] We certified the following question: "In the circumstances of this case, does a psychotherapist have a duty to control a patient being treated on an outpatient basis in order to prevent harm to third persons?"

a carpet installer. Both before and after his military service, Doe was a frequent visitor to the Fraser home. Although Doe spoke repeatedly of spies and carried a buck knife, he never threatened Fraser or any other member of the Fraser family. Nonetheless, on June 17, 1985, without apparent provocation, Doe stabbed Fraser approximately forty times and Fraser died the next day as a result of the stabbing.

At the time of the assault on Fraser, Doe was being treated as a psychiatric outpatient at the medical center. Doe's history of psychiatric care began while he was serving in the military in 1974 after being diagnosed as having schizo-affective schizophrenia manifested by paranoid delusions. Because of his psychosis and the accompanying delusions of violence, Doe thereafter was continuously under psychiatric care, sometimes for brief periods as an inpatient, but otherwise as an outpatient. Doe was an outpatient at the medical center from September, 1979, until the fatal assault on Fraser in 1985. Throughout his psychiatric therapy, Doe suffered from a variety of delusions, believing himself to be engaged in secret spy missions and in violent confrontations involving fights and killings. Doe's medical center records documented that he harbored these delusions, but documented no acts of violence or even threats on his part. They also documented his regular attendance at scheduled therapy sessions.

The medical center's records included information that Doe, in the past, had carried a knife and loaded guns. In 1976, he was arrested for carrying two loaded guns and a knife.[4] His psychotherapists had advised him to get rid of these weapons. Furthermore, Fraser's son had observed Doe carrying knives "as far back as 1981," but he had

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[4] In 1979, he also was arrested once for stealing.

never known Doe to threaten Fraser or any other member of the Fraser family.

On June 6, 1985, Doe informed medical center staff members that he had stopped taking Haldol, his prescribed neuroleptic medication. His doctors persuaded him to take another neuroleptic, Trilafon, and told him to return in one week or sooner. On June 13, 1985, Doe appeared at the medical center as scheduled. At that appointment, he reported that he was feeling and sleeping better as a result of taking the new medication. Staff members were unaware of any deterioration in Doe's mental condition. Four days later, he committed the fatal assault on Fraser.

On this record, the Court of Appeals upheld the determination of the District Court that the plaintiff could not prevail on her claim that the medical center had a legal duty to warn Fraser that Doe would commit an act of violence against him. The Court of Appeals held that, "in the absence of any objective indicia of a patient's propensity to cause harm," summary judgment had properly been granted on this cause of action. The Court of Appeals reserved for us, however, the merits of the plaintiff's alternate cause of action premised on the breach of a duty to control, and this is the basis for the certified question that we agreed to answer.

The question that we certified is whether, in the circumstances of this case, a psychotherapist has a duty to control an outpatient to prevent the outpatient from causing harm to a third person. In its broader form, the certified question addresses the legal consequences of outpatient psychotherapy, specifically whether the relationship between a psychotherapist and an outpatient is properly characterized as the kind of special custodial relationship that imposes on the psychotherapist the duty to control the behavior of the outpatient to prevent the

outpatient from causing bodily harm to third persons. See *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 431, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (imposing duty on psychiatrists to protect foreseeable victims of outpatient); see also 2 Restatement (Second) Torts § 319 (1965).[5] In its narrower form, the certified question addresses the legal consequences of the psychotherapists' failure to control the behavior of an outpatient in the circumstances of this case.

Common law prudence counsels that we should refrain from deciding the broader question. As the Court of Appeals observed in certifying the question of law to us in this case, litigation of this kind does not arise frequently. We have no compelling precedents on which to draw, and courts in other jurisdictions have not arrived at a consensus. Finally, even if we were to resolve the broader question in favor of recognizing a special relationship, we would still have to decide the narrower question of the scope of the duty arising from such a relationship. We, therefore, will confine our discussion to the question of whether a psychotherapist has a duty to exercise control to prevent an outpatient, who was not known to have been dangerous, from inflicting bodily harm on a victim who was neither readily identifiable nor within a foreseeable class of victims.[6]

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[5] Section 319 of 2 Restatement (Second), Torts (1965) provides: "Duty of Those in Charge of Person Having Dangerous Propensities

"One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

[6] The District Court determined that the psychotherapists at the medical center could not have foreseen that Doe would harm anyone. The District Court further determined that they could not have foreseen

Our decision is premised on these factual circumstances because they are the circumstances that have been found to exist in the relevant decision of the federal court in this case. In deciding that the plaintiff had failed to establish a factual predicate for a duty to warn, the Court of appeals expressly concluded that the record demonstrated "the absence of any objective indicia of [Doe's] propensity to cause harm." The Court of Appeals rejected the plaintiff's argument that a jury question was raised by expert testimony that suggested that Doe's psychotherapists should have engaged in a more search inquiry to discover that Doe had become dangerous either to himself or to others.[7] In effect, the Court of Appeals upheld the conclusion of the District Court that "even viewing the facts most favorably to the plaintiff on the

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that, if Doe were to harm anyone, he would attack Fraser or a person within a class of identifiable victims, such as authority figures, that contained Fraser.

[7] The record before the Court of Appeals established that there were no objective indicia, such as threats or acts of violence, in Doe's long history of psychotherapy that Doe had ever been dangerous to anyone, or had exhibited a tendency to become dangerous to anyone. Although these underlying facts are undisputed, the plaintiff submitted the depositions and affidavits of two psychiatric experts and contended that these opinions were sufficient to raise a material question of fact as to whether the medical center should have inquired further to determine if Doe were dangerous. These experts opined that during "the weeks preceding the homicide, Doe's psychiatric condition was in a state of decompensation . . . he was psychotic, and, had the [medical center staff] asked the necessary questions as to how Doe was feeling . . . they would have discovered his state of decompensation." In addition, one of the experts stated that it was predictable that Doe would become violent on June 17, 1985, because the medical center had recently changed his medication. The other expert opined that Fraser was an identifiable victim. The Court of Appeals concluded that these affidavits and depositions did not raise a material question of fact. Our decision is premised on the circumstances that the federal court concluded were determinative in this case.

defendant's motion for summary judgment, the evidence did not show that it was foreseeable that Doe would commit an act of violence against [Fraser]." For the purpose of deciding the certified question of law, namely, whether, in the circumstances of this case, the psychotherapists had a duty to control Doe, we take the underlying facts and circumstances to be the same as those that the federal court concluded were determinative with respect to the psychotherapists' duty to warn.

Turning now to the merits of the certified question, we are persuaded that, as a matter of law in the circumstances of this case, the medical center psychotherapists had no duty to exercise control over Doe to prevent him from assaulting Fraser. We reach this conclusion for four reasons: (1) our decisions defining negligence do not impose a duty to those who are not identifiable victims; (2) in related areas of our common law, we have concluded that there is no duty except to identifiable persons; (3) policy reasons inherent in the psychotherapeutic relationship and in the due process rights of mental patients counsel against imposing expansive duties to exercise control over such patients; and (4) courts in other jurisdictions have overwhelmingly declined to extend any duty to control to encompass harm to unidentifiable third persons.

Existing Connecticut precedents impose only a limited duty to take action to prevent injury to a third person. Our point of departure has been that "absent a special relationship of custody or control, there is no duty to protect a third person from the conduct of another. See 2 Restatement (Second), Torts § 315 (1965); F. Harper, F. James & O. Gray, The Law of Torts (2d Ed. 1986) § 18.7; W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 56." *Kaminski v. Fairfield*, 216 Conn. 29, 33-34, 578 A.2d 1048 (1990); see also *Dennison v. Klotz*, 12 Conn. App.

570, 578-79, 532 A.2d 1311 (1987), cert. denied, 206 Conn. 803, 535 A.2d 1317 (1988). In any determination of whether even a special relationship should be held to give rise to a duty to exercise care to avoid harm to a third person, foreseeability plays an important role. "Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although . . . no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. . . . Thus, initially, if it is not foreseeable to a reasonable person in the defendant's position that harm of the type alleged would result from the defendant's actions to a particular plaintiff, the question of the existence of a duty to use due care is foreclosed, and no cause of action can be maintained by the plaintiff." (Citations omitted; internal quotation marks omitted.) *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 385-86, 650 A.2d 153 (1994).

In only one instance has this court considered what relationships might trigger a special duty of care to protect third parties from personal harm. In *Kaminski v. Fairfield*, supra, 216 Conn. 34-37, we looked to § 319 of the Restatement (Second), Torts, supra, and to *Tarasoff v. Regents of University of California*, supra, 17 Cal. 3d 431, and its progeny, for guidance as to what might constitute such a special relationship. For present purposes, it is significant that we described the duty first articulated in *Tarasoff* and further refined in *Thompson v. County of Alameda*, 27 Cal.3d 741, 752-53, 614 P.2d 728, 167 Cal. Rptr. 70 (1980), as a duty arising out of "a psychotherapist's knowledge of a patient's specific threats against a specific victim, whom the patient subsequently

killed." *Kaminski v. Fairfield*, supra, 37. Our conclusion in *Kaminski* that the injured third party had not established a duty to protect him from physical harm rested in part on the fact that he, unlike the victim in *Tarasoff*, "was not a specifically identifiable victim." Id. We therefore have no precedent for imposing a duty on psychotherapists to exercise control over an outpatient in the absence of a showing that the victim was either individually identifiable or, possibly, was either a member of a class of identifiable victims or within the zone of risk to an identifiable victim.

Related areas of Connecticut negligence law provide support for the proposition that proof that the victim was an identifiable target is ordinarily an essential element of an action in negligence. As a common law matter, to impose liability on a municipal employee who presumptively enjoys immunity in the performance of discretionary governmental acts, a plaintiff must show the existence of circumstances that "make it apparent to the public officer that his or her failure to act would be likely to subject an *identifiable person* to imminent harm. . . . " (Emphasis added; internal quotations marks omitted.) *Mulligan v. Rioux*, 229 Conn. 716, 728, 643 A.2d 1226 (1994), on remand, 38 Conn. App. 546, 662 A.2d 153 (1995); *Burns v. Board of Education*, 228 Conn. 640, 645, 638 A.2d 1 (1994); *Sestito v. Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979). As a statutory matter, although numerous changes in tort law have affected the remedies that may be recovered for breach of duty, none has enlarged the scope of liability in negligence to injured third parties. See, e.g., General Statutes § 52-572h.

Considerations of public policy, which undergird the judicial determination of the scope of duty in the law of negligence, likewise suggest that psychotherapists should not be held liable to third parties who are not foreseeable victims. In addressing the third party liability of attorneys

for the negligent execution of estate planning documents, we have balanced the interests of intended beneficiaries against the interests of the legal profession in honoring the ethical obligations owed by attorneys to their clients. See *Krawczyk v. Stingle*, 208 Conn. 239, 244-46, 543 A.2d 733 (1988) (no liability to intended beneficiary for negligent delay in drafting estate planning documents). We deem it equally appropriate to balance the interests of those injured by psychiatric outpatients against the interests of the mental health profession in honoring the confidentiality of the patient-therapist relationship; see General Statutes §§ 52-146d through 52-146j; and in respecting the humanitarian and due process concerns that limit the involuntary hospitalization of the mentally ill. See *State v. Warren*, 169 Conn. 207, 215-16, 363 A.2d 91 (1975); see also General Statutes §§ 17a-498 and 17a-502; *Payne v. Fairfield Hills Hospital*, 215 Conn. 675, 684, 578 A.2d 1025 (1990). Whatever that balancing process may indicate in other circumstances, it counsels against the imposition of liability for harm to unidentifiable victims or unidentifiable classes of victims of outpatients with no history of dangerous conduct or articulated threats of dangerous behavior. See note, "Duty to Warn Versus Duty to Maintain Confidentiality: Conflicting Demands on Mental Health Professionals," 20 Suffolk U. L. Rev. 579, 612-13 (1986); V. Mangalmurti, "Psychotherapists' fear of *Tarasoff*: all in the mind?," 22 J. Psychiatry & L. 379 (1994); C. Meyers, "Where the protective privilege ends: California changes the rules for dangerous psychotherapy patients," 19 J. Psychiatry & L. 5, 26-27 (1991); R. Schopp, "The Psychotherapist's Duty to Protect the Public: The Appropriate Standard and the Foundation in Legal Theory and Empirical Premises," 70 Neb. L. Rev. 327, 350-60 (1991).

Finally, state courts in other jurisdictions have overwhelmingly concluded that an unidentifiable victim has

no claim in negligence against psychotherapists who were treating the assailant on an outpatient basis. Some state courts have entirely rejected this duty, as identified in *Tarasoff*, and have held that psychotherapists treating outpatients have no liability whatsoever to third persons injured by their outpatients. See, e.g., *Santa Cruz v. Northwest Dade Community Health Center, Inc.*, 590 So.2d 444, 445 (Fla. App. 1991), review denied, 599 So.2d 1278 (Fla. 1992); *Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823, 834-34 (1995); *Nasser v. Parker*, 249 Va. 172, 455 S.E.2d 502, 505-506 (1995). Even courts that have not rejected *Tarasoff* outright, however, have generally not required psychotherapists to take remedial measures for the protection of victims who were not either specifically identifiable or within a class of foreseeable victims. See, e.g., *Hamman v. County of Maricopa*, 161 Ariz. 58, 64, 775 P.2d 1122 (1989) (victim within identifiable zone of danger); *Thompson v. County of Alameda*, supra, 27 Cal.3d 752-53 (specifically foreseeable and readily identifiable victim); *Naidu v. Laird*, 539 A.2d 1064, 1073 (Del. 1988) (victim within foreseeable class); *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 531, 513 N.E.2d 387 (1987), cert. denied, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988) (specifically identifiable victim); *Evans v. Morehead Clinic*, 749 S.W.3d 696, 699 (Ky. App. 1988) (readily identifiable victim); *Furr v. Spring Grove State Hospital*, 53 Md. App. 474, 489, 454 A.2d 414 (1983) (readily identifiable victim); *Hinkelman v. Borgess Medical Center*, 157 Mich. App. 314, 321, 403 N.W.2d 547, appeal denied, 428 Mich. 905 (1987) (readily identifiable victim); *Kerrville State Hospital v. Clark*, 900 S.W.2d 425, 437 n.13 (Tex. App.) (victim within foreseeable zone of danger), writ granted, 39 Tex.Sup.Ct.J. 107 (1995); *Peck v. Counseling Service of Addison County, Inc.*, 146 Vt. 61, 67-68, 499 A.2d 422 (1985)

(identifiable victim);[8] but see, e.g. *McIntosh v. Milano*, 168 N.J. Super. 466, 489-90, 403 A.2d 500 (1979) (any intended or potential victim); *Schuster v. Altenberg*, 144 Wis.2d 223, 234-38, 424 N.W.2d 159 (1988) (anyone injured by patient's dangerous tendencies).[9]

These considerations persuade us that, in the circumstances of this case, the medical center owed no duty to control Doe so as to prevent Doe's assault on Fraser. The medical center neither knew nor had reason to know that Doe would attack Fraser because Fraser was not an identifiable victim, a member of a class of identifiable victims or within the zone of risk to an identifiable victim.

The answer to the certified question is: No.

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[8] Applying state law in accordance with the principles set forth in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), and its progeny, federal court cases have come to similar conclusions. Some cases hold that a psychotherapist does not have a duty to exercise any control over an outpatient. See, e.g. *Currie v. United States*, 836 F.2d 209, 212-13 (4th Cir. 1987) (North Carolina). Other cases hold that such a duty may exist, but that it is limited in scope. See, e.g., *Brady v. Hopper*, 570 F.Sup. 1333, 1338-39 (D. Colo. 1983), aff'd, 751 F2d 329 (10th Cir. 1984) (specific threats to specific victims); *Hasenei v. United States*, 541 F.Sup. 999, 1012-13 and n.24 (D. Md. 1982) (specific danger to readily identifiable person or group of persons); *Lipari v. Sears, Roebuck & Co.*, 497 F.Sup. 185, 193-95 (D.Neb. 1980) (foreseeable victims, which may include members of class).

[9] *McIntosh v. Milano*, supra, 168 N.J. Super. 466, is distinguishable on its facts from the case before us. In *McIntosh*, the psychiatric outpatient had informed his treating psychiatrist that he had had a sexual relationship with the young woman who became his victim, that he had fired a gun at a car belonging to her or her boyfriend, that he "had purchased and carried a knife to show to people to scare them away," and that he had strong negative feelings about the victim after their relationship had ended. Id., 472-73.

No costs shall be taxed in this court to either party.

In this opinion CALLAHAN, BORDEN and KATZ, Js., concurred.

BERDON, J., dissenting. In this very unusual case,[1] we are asked by the United States Court of Appeals for the Second Circuit to determine whether, under Connecticut law, there is a "general duty on the part of a psychotherapist to control a patient being treated on an outpatient basis in order to prevent harm to third persons?"

In its initial order (order) requesting that we accept the certified issues,[2] the Court of Appeals explained that the rendering of a summary judgment by the United States District Court for the District of Connecticut raised two issues under Connecticut law: (1) whether a psychotherapist has a duty to warn; and (2) whether a psychotherapist has a duty to control. With respect to the duty to warn, the Court of Appeals wrote in its order: "The plaintiff asserts that her claim premised on the duty to warn should reach the jury because she presented expert

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[1] This case is unusual because of its procedural posture and because of the facts relied upon by both the majority of this court and the Second Circuit Court of Appeals.

[2] The Court of Appeals requested that we certify the following issues: (1) "Does Connecticut recognize a general duty on the part of a psychotherapist to control a patient being treated on an outpatient basis in order to prevent harm to third persons?" and (2) "if so, do the allegations of the complaint in the pending case, as amplified by the submissions of the plaintiff in opposition to the defendant's motion for summary judgment, present a triable jury issue?" This court amalgamated these issues into the single question we certified: "In the circumstances of this case, does a psychotherapist have a duty to control a patient being treated on an outpatient basis in order to prevent harm to third persons?"

opinion testimony to the effect that the psychiatric staff at [the West Haven Veterans Administration Medical Center (medical center)] would have discovered a threat of harm to [the victim, Hector Fraser,] if the staff had asked [the patient, John Doe,] the right questions. However, in the absence of any objective indicia of a patient's propensity to cause harm, we are unwilling to conclude that, under Connecticut tort law, a claim alleging a breach of a duty to warn should reach a jury solely on the basis of expert opinion testimony suggesting that more searching questioning by the . . . psychotherapist would have revealed the patient's otherwise unforeseeable potential for harm." Upon receiving the order, we requested that the Court of Appeals furnish us with a factual predicate upon which the certified issue may be decided. In response, and because this case comes to the appellate courts by way of summary judgment, the parties entered into a "joint statement of relevant factual circumstances" (stipulation). Because the stipulation was furnished in response to our request, and was specifically approved by the Court of Appeals, that court clearly indicated that we were to decide this case on the facts as set forth in the stipulation.

What is troubling, however, is that the approved stipulation entered into by both parties does not support the factual conclusion on which the Court of Appeals rejected the plaintiff's duty to warn cause of action -- that is, the claim was rejected because of the court's conclusion that there was no objective indicia of Doe's propensity to cause harm. The majority of this court, in its curious rush to embrace this conclusion, looks solely to the order of the Court of Appeals, and ignores the facts set forth in the stipulation. In doing so, this court frames the issue as a rhetorical question: "[W]hether a psychotherapist has a duty to exercise control to prevent an outpatient, who was not known to have been dangerous, from inflicting bodily harm on a victim who was neither readily identifiable nor

within a foreseeable class of victims?" The approved stipulation of the parties, however, contradicts the factual premises that the majority relies upon in reaching its conclusion. The questions of whether Doe had a propensity for violence and whether Fraser was a foreseeable victim are genuine issues of fact to be resolved by the trier. " 'Summary judgment procedure is designed to dispose of actions in which there is no genuine issue as to any material fact.' " *Dougherty v. Graham*, 161 Conn. 248, 250, 287 A.2d 382 (1971); see also Fed. R. Civ. P. 12 (c) and 56. Consequently, the granting of the defendant's motion for summary judgment was improper in this instance.

From 1974 to the time he fatally stabbed Fraser, Doe was continuously treated by the medical center on both an inpatient and an outpatient basis. The objective indicia of Doe's propensity to cause harm prior to his fatal stabbing of Fraser on June 17, 1985, which the Court of Appeals and this court find missing, is clearly set forth in the stipulation. The stipulation provides: "Doe's psychiatric illness was first diagnosed in May, 1974, while he was in the Marines, as 'schizo-affective schizophrenia' by the Evans Mental Hygiene Clinic in Okinawa. . . . A portion of Doe's medical records for [the period from May, 1974, through September, 1979,] describe[s] him to be suffering 'from a mental illness of psychotic proportions' . . . and having 'a very complex system of delusions inolving his role as a special agent and a spy.' . . . Doe's diagnoses included, inter alia, schizophrenia, paranoid schizophrenia, and chronic paranoid schizophrenia. . . . Doe's medical records since May, 1974, detail many incidents where Doe describes himself as being involved in 'secret missions . . . for the [Central Intelligence Agency] and [the Federal Bureau of Investigation] involving secret rendezvous, stakeouts, and top secret investigations' . . . and in *violent confrontations, fights and killings involving knives and*

guns. Doe believed himself to be involved with the Mafia or to be [Frank] Serpico. . . . Doe's therapists believed that these events were part of Doe's delusional thinking. . . . [O]ne of Doe's medical records from [the medical center] in September, 1974, states: 'So far as is known, no behavioral acts of violence have occurred, however, the patient was noted in the service to go to the backs of theaters or other places and when inquiring about what he was doing at these places he reported that he was waiting for contacts so that *at least to some extent this delusional system at times spilled over into behavior.*' . . . Doe is described as dressing in unusual manners (i.e., 'superfly clothes,' army fatigues, long coats). . . . Doe's sister . . . reported incidents where she found Doe laughing out loud for no apparent reason while eating raw meat and *holding a gun*. . . . In September, 1976, Doe was arrested for *carrying two loaded guns and a knife*. . . . A hospital summary dated September 9, 1979, states that Doe had begun keeping *loaded guns close to his bed and had carried them in public places* since the early 1970s." (Emphasis added.) These stipulated facts clearly reflect objective indicia of Doe's propensity to act on his delusions of violence and to harm others.

Furthermore, evidence that Doe's victim should have been foreseeable to the psychotherapists at the medical center was also clearly articulated in the stipulation. "The [medical center's] doctors knew that Doe possessed weapons and carried a knife and loaded guns because Doe's medical records make reference to such conduct. Doe's doctors cautioned him about the dangers associated with guns and/or advised him to get rid of them. . . . Doctors [James] Alexander and [Robert] Granacher [psychiatric experts retained by the plaintiff] have opined that in the months (April and May) and the weeks preceding the homicide, Doe's psychiatric condition was in a state of decompensation (Granacher testified 'massive

decompensation'), he was psychotic, and, had the [medical center's psychiatric staff] asked the necessary questions as to how Doe was feeling--if he was psychotic or having delusions and what he was thinking--they would have discovered his state of decompensation. Doctor [Francis] Hamilton [a third psychiatrist who observed Doe, though not retained by the plaintiff as an expert] testified that on June 17, 1985, Doe was clearly psychotic. . . . Doctor Hamilton identified certain changes in Doe's life and emotional state in the weeks preceding the homicide, (Doe's medication was changed to Trilafon after he reported he had stopped taking Haldol, he had trouble sleeping, *he became more convinced that Hector Fraser was part of a British plot*). . . . Doctors Granacher and Alexander identified these factors as signs of decompensation. . . . Doctors Alexander and Granacher were of the opinion that Doe was potentially violent, a danger to others around him and that the [medical center] should have known of the dangers he posed. . . . Doctor Alexander opined that Hector Fraser, a Scottish immigrant, was an identifiable victim of what he opined was Doe's violent propensity. . . . Doctor Granacher opined that it was predictable that Doe would become violent [on or] about June 17, 1985, because of the amount of time it takes for the medication Doe had stopped taking approximately two and one-half weeks before the homicide to leave his body." (Emphasis added.)

I find it difficult to understand the analysis of the Court of Appeals, and even more so, I find it difficult to understand this court's conclusion. Certainly, neither this court nor the Court of Appeals wants to imply that before a patient is deemed to have a *propensity* for violence, he or she must have actually caused harm to another. Objective indicia of an individual's *propensity* to do violence to another may be revealed in forms other than specific acts or threats of violence. In this case, the medical center's

well documented record indicates that Doe's habit of carrying a hunting knife (the weapon that was used by Doe to stab Fraser forty times) and loaded guns was known. Also known was the fact that Doe suffered from and acted on his delusions of being engaged in secret spy missions and in violent confrontations involving fights and killings. Surely, a reasonable psychotherapist should have recognized Doe as an individual with a propensity for violence. Additionally, Doe's belief that Fraser was involved in a British espionage plot, under the circumstances of this case, identified Fraser as a foreseeable victim. This court should not compound the mistake of the Court of Appeals by blindly accepting that court's conclusion with respect to Doe's propensity to cause harm when such a conclusion is at odds with the stipulation of facts upon which we were specifically requested to decide the certified issue. Accordingly, there is sufficient evidence for a jury to conclude that Doe had a propensity for violence and that Fraser was a foreseeable victim.

In light of the facts of this case, I would reframe the issue as follows: Whether a psychotherapist has a duty to exercise control to prevent an outpatient, who has a propensity to cause harm, from inflicting bodily harm on a victim who was identifiable or was within a class of foreseeable victims? Although the majority does not definitively answer this question, I would assume that, as framed above, their answer would be yes. In other words, a psychotherapist has a duty to third persons to control the conduct of his or her patient when the psychotherapist knows or should know that the patient's dangerous propensities present a foreseeable risk of harm to others.[3]

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[3] I am sensitive to the public policy arguments raised by the amici with respect to the imposition of civil liability on a psychotherapist for failing to control his or her patient who has a

As set forth in § 315 of the Restatement (Second) of Torts, an individual has this duty if "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relation exists between the actor an the other which gives to the other a right to protection." Unlike the situation in *Kaminski v. Fairfield*, 216 Conn. 29, 36, 578 A.2d 1048 (1990), where the court held that under § 319 of the Restatement (Second), supra, a relationship between a parent and an adult child did not constitute a special

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propensity to cause harm and who is not in a custodial setting. Those arguments are: it is difficult for psychotherapists to predict violent behavior, recognizing a duty to control will result in an over prediction of violence and an over commitment of individuals; patients will be reluctant to seek treatment or to make full disclosure of their thoughts; and liability concerns will have a distorting influence on admission decisions. "Against [these interests and arguments], however, we must weigh the public interest in safety from violent assault." *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 440, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) ("When a therapist determines or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." Id., 431.).

Moreover, similar concerns were raised in opposition to the decision enunciated in *Tarasoff*. Since *Tarasoff* was decided in 1976, empirical data indicates that no adverse effects have resulted because of the decision. In a study reported in the Wisconsin Law Review, it was concluded that: (1) 95 percent of the psychiatric medical community believed that it is possible to predict violent behavior; (2) psychotherapists have not ben discouraged from treating dangerous patients; and (3) there has not been an increased use of involuntary commitment of patients perceived as dangerous. D. Givelber, W. Bowers & C. Blitch, "*Tarasoff*, Myth and Reality: An Empirical Study of Private Law in Action," 2 Wis. L. Rev. 443, 463, 479-80, 481-83 (1984). Furthermore, I agree that psychiatry is far from an exact science. Nevertheless, the strengths and weaknesses of the field of psychiatry to predict future behavior are factors that a jury may take into account when determining whether a psychotherapist has acted negligently and has breached his or her duty.

relationship as contemplated in § 315, the relationship in this case between the medical center's treating psychotherapists and Doe does constitute such a relationship.[4] Consequently, this case presents an occasion for this court to adopt the principle embodied in § 315.

Many jurisdictions have recognized a duty on the part of psychotherapists to control the potentially dangerous conduct of their patients. In a case in which the fact pattern is similar to the one presently before this court, a patient had been treated as an outpatient for eighteen months. *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984). After missing a number of scheduled appointments and refusing to take his prescribed medication, the patient entered a restaurant and shot and killed the victim in "an unprovoked and random attack." Id. The *Lundgren* court held that "[c]lose questions on foreseeability should be given to the jury. . . . A jury could also conclude that [the patient] presented a danger to the public when armed with the handguns that figured so largely in his psychosis and that someone in [the treating physician's] position should have foreseen that harm to a member of the public might result." Id., 28-29. Several other jurisdictions have imposed a duty upon psychotherapists treating patients on an outpatient basis. See, e.g., *Lipari v. Sears, Roebuck & Co.*, 497 F. Sup. 185, 193 (D. Neb. 1980) ("the relationship between a psychotherapist and his patient gives rise to an affirmative duty for the benefit of third

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[4] In Connecticut, psychotherapists may exercise control through the emergency commitment procedure set forth in General Statutes § 17a-502(a), which allows a physician to civilly commit an individual whom he or she believes is "mentally ill and dangerous to himself or others . . . and is in need of immediate care and treatment in a hospital for mental illness" for up to fifteen days without a court order. Therefore, in this case, there was a legal mechanism available for the medical center to commit Doe and prevent him from murdering Fraser.

persons . . . [requiring] that the therapist initiate whatever precautions are reasonably necessary to protect potential victims of his patient"); *McIntosh v. Milano*, 168 N.J. Super. 466, 489, 403 A.2d 500 (1979) (despite fact that patient did not communicate specific threats of violence toward identifiable victim, "a psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine . . . that the patient is or may present a probability of danger to that person"); *Kerrville State Hospital v. Clark*, 900 S.W.2d 425, 436-37 n.13 (Tex. App. 1995) (patient need not verbalize specific threat; duty to general public so long as danger is foreseeable); *Peck v. Counseling Service of Addison County, Inc.*, 146 Vt. 61, 68 499 A.2d 422 (1985) ("mental health professional who knows or, based upon the standards of the medical health profession, should know that his or her patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger").

Therefore, I would report to the Court of Appeals that, under Connecticut law, a psychotherapist has a duty to control a patient's conduct if the psychotherapist knows or should know that the patient's dangerous propensities present a foreseeable risk of injury to a victim who is identifiable or within a class of foreseeable victims. Additionally, based on the stipulation, the issues of whether the medical center's psychiatric staff knew or should have known that Doe had dangerous propensities and whether Fraser was a foreseeable victim are questions of fact for a jury.

Accordingly, I dissent.

APPENDIX F - CONNECTICUT SUPREME COURT LETTER RULING CONDITIONALLY ACCEPTING CERTIFIED QUESTION OF LAW

STATE OF CONNECTICUT
(STATE INSIGNIA)
OFFICE FOR APPEALS

Supreme Court
Appellate Court

Francis J. Drumm, Jr.
Chief Clerk

231 Capitol Avenue
Draw Z, Station A
Hartford, Connecticut 06106

September 16, 1994

Attorney Michael P. Koskoff
Koskoff, Koskoff & Bieder, p.C.
350 Fairfield Avenue
Bridgeport, CT 06604

Attorney Christopher F. Droney
United States Attorney
Attorney Nancy L. Griffin
Assistant United States Attorney
157 Church Street, 23rd Floor
New Haven, CT 06510

Re: Agnes Fraser, Executrix of the Estate of Hector Fraser
v.
United States of America
No. 93-6334
CQL 95-001

Dear Counsel:

The Connecticut Supreme Court accepted the following question certified to it by the United States Court of

Appeals for the Second Circuit, provided the Court of Appeals will additionally certify a statement of the relevant factual circumstances:

1. In the circumstances of this case, does a psychotherapist have a duty to control a patient being treated on an outpatient basis in order to prevent harm to third persons?

Within twenty (20) days of this notice, a $250.00 entry fee must be paid to the Clerk of the Superior Court, 95 Washington Street, Hartford, CT 06106. The fee is to be paid equally by the parties. No security or recognizance is necessary as no costs will be taxed in favor of either party.

The rules of appellate procedure govern this matter. For the purposes of those rules, the plaintiff is deemed to be the appellant and the defendant is deemed to be the appellee. The docket number assigned to this matter is **SC 15035**. I am your case manager; my telephone number is (203) 566-6234.

The Connecticut Legal Rights Project, Inc., may wish to apply for amicus status in this Court. See P.B. § 4067.

Please designate those pleadings you deem necessary for a proper presentation of the issue so that I can prepare the record for the appeal.

Very truly yours,

s/Francis J. Drumm, Jr.
Francis J. Drumm, Jr.

cc: Hon. John O. Newman, Chief Judge
Hon. Dennis G. Jacobs, Circuit Judge
Hon. Pierre N. Leval, Circuit Judge

Clerk, United States Court of Appeals
for the Second Circuit (w/original file)
William B. Wynne
Edward Mattison
Richard J. Lynch, A.A.G.
Patrick B. Kwanashie, A.A.G.
Clerk, Superior Court, 95 Washington Street

APPENDIX G - UNITED STATES DISTRICT COURT'S AMENDED RULING ON MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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Administration Medical Center ("West Haven VAMC") at the time of the stabbing.

Doe was diagnosed as suffering from Schizo-affective Schizophrenia while stationed in Okinawa, Japan in May, 1974. Despite his delusions that he was a spy and part of a secret CIA mission during which he had killed people, the examining psychiatrist stated that Doe did not appear to be violent. However, the psychiatrist expressed concern about Doe's ability to continue as a marine and ordered that Doe be medically evacuated back to the United States for further treatment.

In June, 1974, Doe began treatment at the Naval Regional Medical Center in Philadelphia, Pennsylvania. After evaluating him, the Naval Medical Center concluded that Doe was schizophrenic and unsuitable for further military service, but that he was competent to be released without being a hazard to others. Doe's service record reflects no disciplinary action while he was enlisted.

After being discharged, Doe returned home to Connecticut, where he began treatment as a psychiatric outpatient at the West Haven VAMC. Between March and September, 1979, Doe was voluntarily treated on an inpatient basis at the West Haven VAMC, after which he resumed outpatient treatment. Throughout his treatment, Doe continued to believe he was a spy involved in espionage.

In 1981 or 1982, Doe began working as an assistant carpet installer for Hector Fraser, a friend of Doe's family. Doe had previously worked for Fraser when he was a teenager. Doe continued to work as a carpet installer until June 17, 1985, the day he fatally stabbed Hector Fraser. Over the course of years that Hector Fraser and his family had known Doe, Doe had never threatened any of the

Frasers, but he had spoken of spies, worn fatigues, and carried a buck knife.[1]

Approximately two weeks prior to the stabbing, Doe reported to the psychiatrists at the West Haven VAMC that he had stopped taking his medication. The treating psychiatrist prescribed a different medication. On June 13, 1985, Doe reported that he was feeling better with the new medication, and the treating psychiatrist concluded that Doe was not homicidal. On June 17, Doe stabbed Hector Fraser 37 times.

Plaintiff claims that the West Haven VAMC was negligent in failing to warn Hector Fraser of the risk to his life posed by Doe and by failing to institute commitment proceedings against Doe when he reported that he had stopped taking his medications.

DISCUSSION

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. American International Group, Inc. v. London American International Corp., 664 F.2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party.

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[1] Doe's sister has testified that Doe told her that he thought Hector Fraser was a spy, but apparently Doe never discussed this thought with anyone else.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Whether a psychiatrist who is treating a patient on an outpatient basis is liable to a third-party attacked by the patient appears to be a question of first impression in Connecticut. Since Connecticut law is unclear, the court must determine what the state court would rule to be its law on this issue. Doe v. United Social and Mental Health Services, 670 F. Supp. 1121, 1131 (D. Conn. 1987) (citing Holt v. Seversky Electronatom Corp., 452 F.2d 31, 34 (2d Cir. 1971).

Under Connecticut law, in order to sustain a cause of action in negligence, the plaintiff must show that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the harm suffered by the plaintiff. Coburn v. Lenox Homes, Inc., 186 Conn. 370, 377 (1984). Defendant argues it is entitled to summary judgment as a matter of law because it did not owe a duty to control the conduct of Doe or to warn Hector Fraser. "Duty is a question of law and only if a duty is found to exist does the trier of fact then determine whether the defendant violated that duty." Kargul v. Sandpiper Dunes Limited Partnership, 1991 Conn. Super. LEXIS 203 (Jan. 29, 1991) (citing Shore v. Stonington, 187 Conn. 147, 151-52 (1982).

Generally, a duty to use care exists if it is foreseeable that harm may result if care is not exercised. Doe, 670 F. Supp. at 1131; Frankovitch v. Burton, 185 Conn. 14, 20-21 (1981). Connecticut cases addressing the duty to control the conduct of third persons have followed the Restatement (Second) of Torts ("Restatement") §§ 315-19. Kargul, 1991 Conn. Super. LEXIS 203 (discussing duty of girlfriend to take action to prevent her boyfriend from harming a third person and duty of a landlord to take action

to prevent one tenant from harming another tenant); Seymour v. Steiger, 1990 Conn. Super. LEXIS 1716 (Nov. 20, 1990) (discussing duty of parent to take action to prevent adult psychotic child from harming a third person); Dennison v. Klotz, 12 Conn. App. 570, 578 (1987), appeal denied, 206 Conn. 803 (1988) (discussing duty of passenger in a car to take action to prevent harm to a fellow passenger who is about to be injured by the conduct of the driver of the car).

Section 315 of the Restatement provides :

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Because no special relationship existed between the West Haven VAMC and Hector Fraser, the question before the court is whether a special relation existed between the West Haven VAMC and Doe such that the hospital had a duty to control Doe's conduct to prevent him from causing harm to Fraser.

Plaintiff urges the court to follow the holding in Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980). In Lipari, the court addressed the issue of whether the Veterans Administration had a duty to detain a former psychiatric patient or to initiate civil commitment proceedings against him before he fired a shotgun into a

crowded nightclub, killing the plaintiff. Analyzing Nebraska law, the court held that "when, in accordance with the standard of his profession, the therapist knows or should know that his patient's dangerous propensities present an unreasonable risk of harm to others," he has an affirmative duty to initiate whatever precautions are reasonably necessary to protect potential victims of his patient. This duty may be to warn a potential victim, but it may include instituting commitment proceedings against his patient. 497 F. Supp. at 193.

Lipari was based on a finding that a special relationship existed between a psychotherapist and a patient under Nebraska law. In Connecticut, a special relationship has been found to exist between the actor and a third person when the actor has custody or control over the third person. Generally, Connecticut has recognized a special relationship only "in the context of professional custodians with special competence to control the behavior of those in their charge." Kaminski v. Fairfield, 216 Conn. 29, 35 (1990); see also De Shaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 197-201 (1989) (no special relationship between state and third person giving rise to a duty to control absent some sort of official custody of third person). For example, a special relationship has been found to exist where a plaintiff is in state custody, where a plaintiff is a tenant of a state housing agency, where a child is in the care of state social services, and where state officials knew or should have known of a special danger posed to the plaintiff in relation to some one in their custody or control. Seymour, 1990 Conn. Super. LEXIS 1716. Thus, Connecticut cases have recognized that a special relationship must include the right or the ability to control another conduct.

The majority of courts that have analyzed the relationship between a psychiatrist and a voluntary patient

have found that the psychiatrist has a duty to control the patient only when he knows or has reason to know that the patient poses a specific threat to a particular person or when the patient is involuntarily committed. For example, in Burchfield v. United States, 750 F. Supp. 1312, 1319 (S.D. Miss. 1990), the court found that the United States owed no duty to a randomly selected victim of assault by a disabled veteran who had been a voluntary patient at the Biloxi Veterans Administration Medical Center. Although the psychiatric patient in Burchfield had a history of violent behavior, the court found that the patient was properly admitted to an open ward and that no special relationship existed between the hospital and the patient such that the hospital had a duty to control the conduct of the patient to prevent him from harming an unforeseeable victim of his attack. 750 F. Supp. at 1319.

Similarly, in Currie v. United States, 836 F.2d 209, 210 (4th Cir. 1987), the court held that a therapist did not have a duty to seek control over his patient through involuntary commitment. In Currie, Leonard Avery, a psychiatric outpatient at the Veterans Administration mental health clinic in Durham, North Carolina, threatened to blow up one of his employer's building and its employees. During a phone conversation with Avery, a psychiatrist at the hospital convinced Avery to agree to a voluntary commitment, but Avery failed to show up at the hospital. The hospital reported Avery's threat to his employer and to law enforcement agencies, but determined that Avery was not a candidate for involuntary commitment. Subsequently, Avery showed up at his employer's facility with homemade bombs and a semi-automatic rifle and opened fire, killing one employee and wounding others. Because Avery was not within the custody or control of the hospital at the time of the assault, the court held that no special relationship existed between the hospital doctors and Avery and, therefore, the doctors had no duty to seek the commitment

of the patient. The court did find, however, that the doctors had a duty to warn potential, identifiable victims of violence. 836 F.2d at 212-13.

Finally, in Anthony v. United States, 616 F. Supp. 156, 159 (D.C. Iowa 1985), the court held that although the Veterans Administration hospital had a duty to warn potential, identifiable victims of violence, it had no duty to confine a voluntarily admitted patient who posed a threat to the public at large.

Connecticut follows the majority rule with respect to finding a special relationship between an actor and a third person. Absent some sort of custodial relationship, there is no duty to control the conduct of the third person. See Kaminski, 216 Conn. at 35 ("the reported cases that have recognized a duty to control have generally done so in the context of professional custodians with special competence to control the behavior of those in their charge."); see also Seller v. United States, 870 F.2d 1098, 1104-05 (6th Cir. 1989) (unless a psychiatric patient is within the legal custody of the hospital, no special relationship exists); Metlow v. Spokane Alcoholic Rehabilitation Center, 55 Wash. App. 845, 848 (1989) (absent special relationship, no duty to control third person); Hansenei v. United States, 541 F. Supp. 999 (D. Md. 1982) (no special relationship exists between psychiatrist and voluntary patient). Because Doe was a voluntary outpatient, the West Haven VAMC had no special relationship with respect to Doe which would impose a duty to control Doe to protect the public at large.

Plaintiff contends that Connecticut's commitment statute imposes an affirmative duty on a psychiatrist to institute commitment proceedings against a patient who is deemed to pose a risk to others. Conn. Gen. Stat. § 17a-502 is the statute outlining the procedures for emergency

commitment of a mentally ill person, the type of procedure that would have been available to the West Haven VAMC on June 13, 1985. The statute provides in pertinent part:

> (a) Any person who a physician concludes is mentally ill and dangerous to himself or others . . . and is in need of immediate care and treatment in a hospital for mental illness, may be confined to such a hospital . . . under an emergency certificate as hereinafter provided for not more than fifteen days without order of any court . . .. At the time of delivery of such person to such hospital, there shall be left, with the person in charge thereof, a certificate, signed by a physician licensed to practice medicine or surgery in Connecticut and dated not more than three days prior to its delivery to the person in charge of the hospital. Such certificate shall state the date of the personal examination of the person to be confined, which shall be not more than three days prior to the date of signature of the certificate, shall state the findings of the physician relative to the physical and mental condition of the person and the history of the case, if known, and shall state that it is the opinion of the physician that the person examined is mentally ill and dangerous to himself or herself or others . . . and is in need of immediate care and treatment in a hospital for mental illness. Such physician shall state on such certificate the reasons for his or her opinion.

The plain language of Conn. Gen. Stat. § 17a-502 is permissive in nature. It does not impose an affirmative duty on doctors to institute a commitment proceedings against a patient. Rather, it is left to the professional discretion of the doctor to determine whether there is a "substantial risk that physical harm will be inflicted by an individual upon his or her own person or upon another

person." Conn. Gen. Stat. §17a-495. This statute does not change Connecticut's rule requiring a special relationship between the psychiatrist and the patient in order to impose an affirmative duty on the psychiatrist to control the behavior of the patient. Since no special relationship existed between the West Haven VAMC and Doe, the West Haven VAMC was under no obligation to institute commitment proceedings against Doe.

Even though the West Haven VAMC had no duty to control Doe, it may have had a duty to warn Hector Fraser of the risk to his life posed by Doe. This duty to warn is premised on Connecticut's imposition of a duty to use care if it is foreseeable that harm may result if care is not exercised, not a duty to control the conduct of a third party. See Doe, 670 F. Supp. at 1131; Frankovitch, 185 Conn. at 20-21. Although there is no case on point, the court in Kaminski appeared to acknowledge the rule that a psychiatrist who knows or should know that a patient poses a threat to a particular victim or class of victims has a duty to warn such victims of the danger to their lives. 216 Conn. at 37. Thus, the question remaining is whether genuine issues of fact exist as to whether the West Haven VAMC knew or should have known that Doe posed a threat to Hector Fraser's life, thereby giving rise to a duty to warn.

In determining whether the West Haven VAMC knew or should have known that Doe posed a threat to Hector Fraser's life, the court must determine first whether it was foreseeable that Doe would act out his delusions through a violent act, and second, whether Hector Fraser was a foreseeable victim of Doe's violence. Between 1974 and 1985, Doe had delusions that he was a spy involved in various secret missions and that he had killed people in the course of these missions. Throughout this period, Doe was known to carry weapons. Yet, Doe was treated for his

schizophrenia on a voluntary, outpatient basis for the majority of a decade. Not once during that period did he threaten Hector Fraser or any other person. Further, on June 13, 1985, just days before the fatal stabbing, the treating psychiatrist noted that Doe's condition had improved with his new medication and that he was not homicidal.

Taking the facts in a light most favorable to the plaintiff, plaintiff has failed to raise genuine issues of fact as to the foreseeability that Doe was violent and a threat to others. First, there is no record of Doe assaulting anyone in Okinawa. Rather, the incident to which plaintiff alludes was recorded in Doe's medical record as delusion. Further, an isolated incident in 1974 followed by 10 years of non-violence would not render Doe's attack on Fraser foreseeable. Second, the fact that Doe stated in 1975 that he was angry at his employer for taking advantage of his willingness to work is not a statement which would indicate to doctors in 1985 that Doe would attack Fraser, a different employer with whom Doe had a close rapport. Third, the fact that in 1979 Doe stole $157 from a former employer because he believed his employer was trying to kill him does not suggest that Doe would attack Fraser. On the contrary, the fact that Doe stole in self-defense instead of attacked in self-defense weakens plaintiff's claim that Doe's violence was foreseeable. Finally, the statement by plaintiff's expert that the treating doctor in June, 1985, failed to make a proper assessment of whether Doe posed a threat to others is not supported by the evidence. In fact, the treating physician on June 13, 1985, concluded that Doe was not homicidal, albeit without giving reasons for that conclusion.

Thus, no genuine issue of fact exists regarding the foreseeability that Doe would commit an act of violence upon another person, just days after he reported being in an

improved condition. Since Doe's violence was unforeseeable, West Haven VAMC was under no duty to warn Hector Fraser. Accordingly, defendant's motion for summary judgment must be granted as a matter of law.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment [143-1] is GRANTED.

Dated at Bridgeport, Connecticut this 15th day of July, 1993.

s/Warren W. Eginton
Warren W. Eginton
Senior U.S. District Judge

APPENDIX H - DISTRICT COURT'S ENDORSED ORDER AFFIRMING GRANT OF SUMMARY JUDGMENT UPON RECONSIDERATION/REARGUMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AGNES FRASER, EXECUTRIX OF THE ESTATE OF HECTOR FRASER	: CIVIL ACTION NO.
	: B-87-125(WWE) /s/B. Wms.
v.	:
UNITED STATES OF AMERICA	: JULY 30, 1993

PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff most respectfully moves this Court, pursuant to Rule 9(e) of the Local Rules of Civil Procedure, for reconsideration of this Court's "Ruling" dated July 9, 1993, and "Amended Ruling" dated July 15, 1993, wherein this Court granted summary judgment in favor of defendants. Upon reconsideration being granted, plaintiff further requests that the prior rulings be vacated and that a new order be entered denying defendant's motion for summary judgment.

The grounds for plaintiff's instant motion are: 1) newly discovered evidence exists relevant to material issues of fact, rendering summary judgment inappropriate in this case; 2) the Court misconstrued and/or misapplied certain principles of law relating to summary judgment, the duty to warn, and the duty to control another's conduct; and, 3) the Court overlooked certain

ORAL ARGUMENT REQUESTED

FILED
SEP 21 4:33 PM '93
CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

9/21/93: MOTION FOR RECONSIDERATION GRANTED. After reconsideration, this court's previous ruling granting summary judgment is AFFIRMED.

s/Warren W. Eginton s/BWms.
Warren W. Eginton, Senior U.S.
District Court Judge

APPENDIX I - FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 2674

Liability of United States, provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for who benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose

act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.
(June 25, 1948, c. 646, 62 Stat. 983; Nov. 18, 1988, Pub.L. 100-694, §§ 4, 9(c), 102 Stat. 4564, 4567.)

APPENDIX J - SECTIONS 315 and 319 2 RESTATEMENTS (SECOND) TORTS

Title A Duty to Control Conduct of Third Persons

§ 315. General Principle

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

§ 319. Duty of Those in Charge of Person Having Dangerous Propensities

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.